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THE
GENERAL ORDERS, AND STATUTES,

RELATING TO THE

PRACTICE, PLEADING, AND JURISDICTION

OF THE

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4924
COURT OF CHANCERY

FOR UPPER CANADA,

WITH

COPIOUS NOTES, COMPILED FROM THE ENGLISH REPORTS
AND CONTAINING A SUMMARY OF EVERY REPORTED
CANADIAN DECISION THEREON,

AND

A BOOK OF FORMS,

BY

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AND

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TORONTO :
HENRY ROWSELL,
LAW BOOKSELLER AND PUBLISHER,
KING STREET EAST.

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TO
THE HONORABLE
PHILIP MICHAEL MATTHEW SCOTT VANKOUGHNET,
CHANCELLOR OF UPPER CANADA,
ETC., ETC., ETC.,
THIS WORK
IS,
WITH HIS PERMISSION,
MOST RESPECTFULLY
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PREFACE.

It is not without a considerable degree of diffidence, and some degree of apprehension, that we venture to intrude ourselves upon the notice of the profession at so early a period of our professional career. With the exception of a work by Mr. T. W. Taylor, published as "Taylor's Orders," in 1860, in which he collected the orders of court then in force, and of which he has, since the announcement of this work, issued a second edition, no work has yet appeared upon the practice of the Court of Chancery in Upper Canada. The Acts and Orders relating to the jurisdiction and practice of the court, have, up to the present time, been scattered and difficult to be procured. They have never been consolidated and arranged in a single volume. It is true that there are numerous existing treatises published in England on Chancery Practice, and although, on the one hand, they are approved as indicating the practice of the court, yet, on the other hand, a very large proportion of the commentary is inapplicable to the proceedings of our own court.

The object of the present volume is to give all the orders of the court and to consolidate them, to set out all the acts relating to its jurisdiction, and in immediate connection therewith to offer an analysis of decisions thereon, serving to interpret, or at any rate to explain, the same, and to shew at a glance the construction which each order and act has received.

The practice of the Court of Chancery in Upper Canada has during the past five years been widely extended, and is not now confined to any particular locality in Upper Canada: the practice is general. The want therefore of such a work as the ensuing pages offer has been largely felt, and with a view of increasing its utility a very compendious Book of Forms has been added.

The reports have been carefully collated; every reported case has been

vouched, and the latest decisions have been brought within the scope of the work.

The forms will be found practically useful and correct.

As a first effort the authors can hardly venture to hope that the present volume will be found to be a complete Book of Practice—they cannot pretend to call it a Chancery Practice—but having regard to the fact, that it contains all the orders consolidated, and all the acts, with an interpretation thereof, illustrated by upwards of three thousand judicial decisions, and embracing therein every reported decision in our own court, and the most recent and apt decisions of the court in England, they bespeak for their efforts the consideration of the profession. How far they have succeeded in their endeavors to render their volume as little inferior as possible to a Chancery Practice, properly so called, the profession must judge; for their own part, if they can be considered as having in any degree added to the utility of other treatises, and so adapted them as to aid the practitioner in the pursuit of his profession in the Court of Chancery in this province, they will feel themselves amply re-paid for the time they have bestowed upon the present work.

TORONTO, C. W., 1st July, 1863.

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PART THE FIRST.

GENERAL ORDERS
OF THE
COURT OF CHANCERY
FOR UPPER CANADA.

ORDERS OF COURT.

3RD JUNE, 1853.

THE JUDGES of the Court of Chancery do hereby, General orders and rules.
in pursuance of an Act of Parliament passed in the
twelfth year of the reign of Her present Majesty,
intituled "An Act to provide for the more effectual
administration of Justice in the Court of Chancery, in
the late province of Upper Canada," and of an act
passed in the 13th & 14th years of the reign of Her
present Majesty, intituled "An Act to amend the Re-
gistry Law of Upper Canada," and in pursuance and
execution of all other powers enabling them in that
behalf, order and direct that all and every the rules,
orders and directions hereinafter set forth, shall hence-
forth be, and for all purposes be deemed and taken to
be, general orders and rules of the Court of Chancery,
viz.:—

INTRODUCTORY—INTERPRETATION.

[ORDERS I., II., AND III.]

INTRODUCTORY.

Orders to take
effect on 1st of
July, 1853.

I. These orders are not to affect suits already commenced, except as hereinafter provided; and as to all suits hereafter to be commenced, they are to take effect on the 1st day of July, 1853.

All former or-
ders repealed.

II. All the orders of this court which were in force on the 1st day of May, 1850, numbered from I. to CXCII.; and all orders promulgated on the 7th day of May, 1850, numbered from I. to LXXXIV.; and all the orders promulgated on the 7th day of January, 1851, numbered from I. to XXV., are hereby abrogated and discharged, except as to suits already commenced.

INTERPRETATION.

Interpretation.

III. In these orders the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there is something in the subject or context repugnant to such construction, viz.:

1. Words importing the singular number include the plural number; and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word "person" or "party" includes a body politic or corporate.
4. The word "bill" includes information.
5. The word "plaintiff" includes informant.
6. The word "affidavit" includes affirmation.

INTERPRETATION—COMPUTATION OF TIME.

[ORDERS IV. AND V.]

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- 7 The word "legacy" includes an annuity and a specific as well as a pecuniary legacy.
8. The word "legatee" includes a person interested in a legacy.
9. The expression "residuary legatee" includes a person interested in the residue.
10. The word "order" includes decree and decretal order.

IV. The long vacation is to commence on the 1st day of July, and to terminate on the 21st day of August in every year. Long Vacation.

COMPUTATION OF TIME.

V. When any time limited from or after any date or event is appointed or allowed for doing any act or taking any proceeding, the computation of such limited time is not to include the day of such date, or of the happening of such event, but is to commence at the beginning of the next following day; and the act or proceeding is to be done or taken at the latest on the last day of such limited time, according to such computation. One day to be inclusive, and one exclusive.

SEC. 2.—When the time for doing any act, or taking any proceeding is limited by months, not expressed to be calendar months, such time is to be computed by lunar months of twenty-eight days each. "Month" means lunar month.

SEC. 3.—When the time for doing any act, or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day—such act or proceeding is, so far as regards the time of doing or taking the same, to be held to be duly done or Where the time of doing any act falls on Sunday, &c.

PRACTICE AS TO LONG VACATION.

[ORDER V., SECS. IV. AND V.]

taken, if done or taken on the day on which the offices shall next open. (a)

(a) Where the day appointed by the master's report for payment of the mortgage money found due by the report fell upon a Sunday, the court refused to make a final order of foreclosure, notwithstanding that attendance had been given on the Saturday and Monday preceding and following the day named, and the money was still unpaid. (*Holcomb v. Leach*, 3 Grant, 449.) Where a notice of motion had been given for Good Friday, the court refused to entertain the motion at the next sitting. (*Fitzgerald v. Phillips*, 3 Grant, 535.)

The time of vacation not to count for certain purposes.

SEC. 4.—The time for vacation is not to be reckoned in the computation of the times appointed or allowed for the following purposes, viz.:

1. Amending or obtaining orders for leave to amend bills.
2. Setting down demurrers.
3. Filing replications, or setting down causes under the directions of rule XVIII. (b)

(b) The time appointed by the court for vacation at Christmas is not excepted in the computation of the time allowed for amending the bill. *Spragge v. C.*, deciding in *Connolly v. Montgomery*, Grant's Cham. Rep. 20, that the above order, 5, of 1853, had reference to the long vacation only. This decision was given after consultation with the other members of the court. And by the order of the 30th June, 1858, it is ordered that the time of the long vacation is not to be reckoned in the computation of the time appointed or allowed for the purpose of answering either an original or amended bill. The long vacation is not reckoned in computing the six months from the service of the bill, within which the plaintiff may move *ex parte* for an order *pro confesso*. (*Kerr v. Clemmow*, Grant's Cham. Rep. 14; *Grange v. Conroy*, Grant's Cham. Rep. 70.) It would seem that the long vacation is reckoned in computing the fourteen days allowed for confirmation of the Master's report.

See *Stinton v. Taylor*, 4 Hare, 608, where it was held that the rule does not apply to the filing of replications generally.

Query, whether proceedings taken in the Master's Office during the vacation are regular.

SEC. 5.—The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such secu-

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SECURITY FOR COSTS.

[ORDER V., SEC. V.]

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urity is given, is not to be reckoned in the computation of time allowed a defendant to answer or demur. (c)

(c) A plaintiff cannot be compelled to give security for costs, unless he himself states upon his bill, that he is resident out of the jurisdiction, or unless the fact is established by affidavit. If it appear on the face of the bill that the plaintiff is not merely without the jurisdiction, but is *residing* out of the jurisdiction, then the defendant is entitled to take out on *præcipe* from the office of the registrar or deputy registrar, (see Order XLIV., sec. 4.) where the bill is filed, an order for the plaintiff to give security. The mere circumstance of the plaintiff having gone abroad will not be a sufficient ground on which to compel him to give security, unless it is stated either by the plaintiff himself, or upon affidavit, that he is gone abroad for the purpose of *residing* there. (Green v. Charnock, 3 Bro. C. C. 371; 2 Cox, 284; 1 Ves. J. 396; Hoby v. Hitchcock, 5 Ves. 699.) The order so obtained on *præcipe*, should also state that all proceedings are stayed until security be given, otherwise the plaintiff will be at liberty to take any proceedings which will not affect the defendant's right to answer, such as amending bill, and taking it *pro confesso* against a defendant who does not demand security. The order will not be granted if even one among several plaintiffs is within the jurisdiction, though the others may be out of the jurisdiction. (Walker v. Easterby, 6 Ves. 612.)

An order that the plaintiff do give security for costs may be, therefore, obtained by a defendant as of course, if it appears upon the face of the bill that the plaintiff or plaintiffs, not one or more of several plaintiffs, but the plaintiff or plaintiffs is or are, either residing out of the jurisdiction of the court, or if not residing, is or are out of the jurisdiction, and likely to continue and be out of the jurisdiction when the defendant may be in a position to call upon the plaintiff to pay costs.

Each set of defendants may call upon the plaintiff to give security, notwithstanding that the plaintiff, upon a previous requisition on the part of one defendant, may have given a bond generally to all the defendants.

A defendant cannot require that the plaintiff shall give security for costs, if, in knowledge of the fact of the plaintiff's residence, or being out of the jurisdiction of the court, he nevertheless files an answer.

In ordinary cases, the order may be obtained on *præcipe*, as of course. In other cases, a notice of motion must be given. On presenting the *præcipe* to the registrar for the order of course, an office-copy of the bill should also be produced in proof, that in the bill the plaintiff is stated to be, or appears to be, resident out of the jurisdiction.

The order, when obtained, is to be served on the plaintiff's solicitor, who thereupon gives to the solicitor of the defendant who obtained the order, the name, address, and description of the proposed surety or sureties. The plaintiff is not bound to propose to the defendant the names of his sureties. He may give the bond at once. But to propose such names is the usual course, as otherwise, in the event of an objection being sustained, the consequences both as respects the bond and as to costs, may be somewhat serious to the plaintiff.

The plaintiff need not name more than one surety; but it is more usual to name two, and it is indeed advisable, otherwise, in the event of the death of one, it will be necessary to renew the bond. If one surety, or all the sureties die, or become bankrupt, an order should be obtained for stay of proceedings until a new surety is appointed. If no objection to the proposed surety or sureties is intimated by the defendant's solicitor within two days from the proposal of the names, he cannot

SECURITY FOR COSTS.

[ORDER V., SEC. V.]

afterwards object, and the bond may be executed and deposited with the registrar, and notice thereof served upon the defendant's solicitor on the same day, and it is desirable that notice thereof should likewise be given to the solicitors of all the other defendants. If the defendant's solicitor objects, which he has a right to do, (*Cliffe v. Wilkinson*, 4 Sim. 122,) the plaintiff must find others, or the objection must be brought before and determined by a Judge in Chambers.

The form of bond will be found in the Book of Forms, Part the Second.

When security is asked for on the ground that the plaintiff is out of the jurisdiction, and an application is made to a Judge in Chambers on motion that he do give security for costs, the question arises whether the party is resident abroad or not, within the meaning of the rule, and the answer to that question depends in each case upon the interpretation to be put upon the phrase "resident," or, "permanently resident" abroad. If a plaintiff goes to reside abroad, under circumstances rendering it likely that he will remain abroad for such a length of time that there is no reasonable probability of his being forthcoming when the defendant may be entitled to call upon him to pay the costs in the suit, that is sufficient. (*Blakeney v. Dufaur*, 2 DeG. M. & G. 771.) Applications for security must be made before answer. (See cases cited *infra*.)

The mere fact of a plaintiff being in the service of the Crown, and absent from the jurisdiction of the court, is not sufficient to exempt him from giving security for costs; to do so, it must be shewn that he is absent from his domicile in the service of the Crown. (*Dickenson v. Duffill*, 8 U. C. L. J. 326.) The judgment in this case by *Spragge*, V. C., reviews at considerable length the various authorities upon the subject.

The solicitor cannot be the security; (*Panton v. Labertouche*, 1 Ph. 265; *Beckett v. Wragg*, Grant's Cham. Rep. 5;) and as to the nature of the security, see *Plestow v. Johnston*, 2 W. R. 3.

The plaintiff is only bound to divide one penalty among all the defendants. (*Lowndes v. Robertson*, 4 Mad. 465.)

The surety must be a solvent person, (*Cliffe v. Wilkinson*, 4 Sim. 122,) and where the surety became bankrupt after a decree dismissing the plaintiff's bill, but from which the plaintiff was appealing, the court stayed the proceedings in it till a new surety was appointed. (*Lautour v. Holcombe*, 1 Ph. 262; *Veitch v. Irving*, 11 Sim. 122.) In *Bainbrigge v. Moss*, 3 K. & J. 62; 3 Jur. N. S. 107; the defendant's costs of sending a clerk abroad to enquire into the solvency of the surety were allowed.

A bond for £100 is "a sufficient security for costs." (*Australian Steamship Company (limited) v. Fleming*, 4 K. & J. 407;) and see *Plestow v. Johnston*, 2 W. R. 3. As to what constitutes a waiver of the defendant's right, see *Murrow v. Wilson*, 12 Beav. 497; *Swanzy v. Swanzy*, 4 K. & J. 287; *Player v. Anderson*, 15 Sim. 104; *Ainslie v. Sims*, 17 Beav. 57.

Where plaintiff is abroad, and the defendant becomes apprised of it he cannot obtain security for costs, if he afterwards takes any other step in the cause such as applying for time to answer, (*Meliorucchy v. Meliorucchy*, 2 Ves. 24; s. c., 1 Dick 147; *Chapin v. Clarke*, per *Esten*, V. C., 28th June, 1859,) nor will security for costs be granted after any step, as answering or obtaining time to answer by defendant; (*Craig v. Bolton*, 2 Bro. C. C. 609; *Anon* 10 Ves. 287; *Prior v. White*, 2 Moll. 361;) otherwise, if at the time of answering, he had no notice that the plaintiff was out of the jurisdiction. (*Ibid.*) Where a plaintiff, upon his bill, misstates his place of residence, the court will order him to give security for costs. (*Sandys v. Long*, 2 Myl. & K. 487; s. c., 7 Sim. 140.) See also, *Calvert v. Day*, 2 Y. & Coll. 217. If, however,

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SECURITY FOR COSTS.

[ORDER V., SEC. V.]

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before the order for security is obtained, the plaintiff amends his bill and inserts his residence correctly, security for costs will be refused. (*Ackerley v. Frodsham*, 8 L. J. N. S. Ch. 240.)

A defendant in an interpleader suit, who was out of the jurisdiction, was ordered to give security for costs, he being looked upon as a plaintiff. (*Smith v. Hammond*, 6 Sim. 15.)

If the plaintiff be resident out of the jurisdiction of the court, the defendant is entitled to an order for security for costs, and that in the meantime all proceedings in the suit may be stayed. All the plaintiffs, however, when there are several, must be resident abroad, for if any one be within the jurisdiction the defendant is not entitled to security. (*Walker v. Easterby*, 6 Ves. 612.)

Neither will security be ordered where the plaintiff is residing abroad in an official capacity, or in actual service as a British officer. (*Evelyn v. Chippendale*, 9 Sim. 497; *Clark v. Fergusson*, 1 Giff. 184; 5 Jur. N. S. 1155; *Colebrook v. Jones*, 1 Dick. 154.) If it be not distinctly stated that plaintiff is abroad on actual service, security will be ordered. (*Lillie v. Lillie*, 2 M. & K. 404.)

The plaintiff in a cross suit, whether the original suit be at law or in equity, although residing out of the jurisdiction, is not bound, as against the plaintiff in the original suit, to give security. (*Vincent v. Hunter*, 5 Hare, 320; *Wild v. Murray*, 18 Jur. 892; 2 W. R. 613; 2 Eq. R. 1095; *Watteau v. Billam*, 18 L. J. 455; 14 Jur. 165; 3 DeG. & Sm. 516; and see *Sloggett v. Viant*, 13 Sim. 187; *Thornton v. Wilson*, 1 Hog. 20; *MacGregor v. Shaw*, 2 DeG. & Sm. 860; *Wilkinson v. Lewis*, 3 Giff. 394; *Fenwick v. Fortescue*, Bunb. 272.) In testing whether a bill is really a cross bill, the question is whether the bill is a simple bill of defence against some existing attack. (*Tynte v. Hodge*, 11 W. R. 52; 7 L. T. N. S. 349; 8 Jur. N. S. 1226.)

A plaintiff filing a bill to restrain an action at law need not give security. (*Watteau v. Billam*, 3 DeG. & Sm. 516,) and that too, notwithstanding the bill may ask for relief other than the injunction. (*Manley v. Williams*, Grant's Chamber R. 48.)

Where one of several defendants after decree, obtained leave to have the conduct of the cause, he was ordered, being out of the jurisdiction, to give security. (*Mynn v. Hart*, 9 Jur. 860.)

If a person out of the jurisdiction petitions for the taxation of a solicitor's bill, he will be required to give security. (*Anon.* 12 Sim. 262; *Re Dolman*, 11 Jur. 1095.)

So where a person not a party to the suit presents a petition and is out of the jurisdiction, the respondent may apply at once for security, without waiting until the petition comes on. (*Atkins v. Cook*, 3 Drew. 694; 3 Jur. N. S. 283; 5 W. R. 381; *Partington v. Reynolds*, 6 W. R. 807; see also *Drever v. Maudesley*, 5 Russ. 11.)

A defendant, however, although out of the jurisdiction, has a right to present a petition in the suit, without giving security for the costs of the petition. (*Cochrane v. Fearon*, 18 Jur. 568.)

In like manner security will be ordered if the plaintiff appears to have no fixed residence; (*Player v. Anderson*, 15 Sim. 104; 10 Jur. 169; but see *Hurst v. Padwick*, 12 Jur. 21;) or is on a voyage at sea, and there is nothing to shew when he may return. (*Stewart v. Stewart*, 20 Beav. 322.)

So where a plaintiff had left his residence shortly after filing the bill, and no information could be obtained from his solicitors as to his abode, security was ordered. (*Manby v. Bewicke*, 2 Jur. N. S. 671; 4 W. R. 757; 8 DeG. M. & G. 468; over-

SECURITY FOR COSTS.

[ORDER V., SEC. V.]

ruling decision of *V. C. Wood*, see 3 W. R. 646; 1 Jur. N. S. 1015; *Bailey v. Gundry*, 1 Keen. 53.) See, however, *Hurst v. Padwick*, 12 Jur. 21; *Lumley v. Hughes*, 2 W. R. 112; *Watts v. Kelly*, 6 W. R. 206; and the like where the plaintiff was not to be met with at the place described, and was keeping out of the way to avoid process. (*Oldale v. Whitehead*, 28 L. J., 333; 5 Jur. N. S. 84; 7 W. R. 157.) So if the plaintiff's residence, as described in the bill, be insufficient or vague, security will be ordered; thus where the plaintiff was described as then working on a particular railway line, naming it, security was ordered. (*Sibbering v. Earl Balcarras*, 1 DeG. & S. 683; 17 L. J. 102; 12 Jur. 108; *Grant v. Mills*, 29 L. T. 11; *Griffith v. Ricketts*, 5 Hare, 195.)

So if the plaintiff wilfully misrepresents his residence, an order will be granted; (*Sandys v. Long*, 7 Sim. 140; affirmed 2 M. & K. 487;) but not where it is done innocently and from mere error. (*Simpson v. Burton*, 1 Beav. 556-8.) Or without any wilful intention to conceal or mislead. (*Smith v. Cornfoot*, 1 DeG. & S. 684; 12 Jur. 260; *Watts v. Kelly*, 6 W. R. 206.) Neither will an order be granted merely on the ground that, at the time of filing the bill, the plaintiff was not actually resident at the place of which he is described. (*Hurst v. Padwick*, 17 L. J. 169; 12 Jur. 21; *Lumley v. Hughes*, 2 W. R. 112; 22 L. T. 197.)

The defendant should lose no time in making the application, for if he take any subsequent step in the cause after he has ascertained that he is entitled to security, he will, in general, waive his right thereto. (*Cooper v. Purton*, 8 W. R. 702; but see *Swanzy v. Swanzy*, 4 K. & J. 287; 27 L. J. 419; 4 Jur. N. S. 1013; 6 W. R. 414; *Jackson v. Davenport*, 9 W. R. 356; see also 2 Ves. 24; *Craig v. Bolton*, 2 Bro. C. C. 609; *Loneragan v. Rokeby*, 2 Dick. 799.)

Where a defendant wishes to obtain security after he has answered, he must make a special application supported by affidavit. (*Wyllie v. Ellice*, 11 Beav. 99; 17 L. J. 878; 12 Jur. 711.)

An executor or administrator residing abroad must give security for costs (*Knight v. DeBlaquiere*, San. & Sc. 648.) See as to infants, &c., out of the jurisdiction suing by a next friend. (*Lander v. Parr*, 16 L. J. Ch. 269.)

Where a plaintiff goes abroad pending the suit under suspicious circumstances, he may be ordered to give the security, (*Blakeney v. Dufaur*, 2 DeG. M. & G. 771; s. c. 16 Beav. 292,) and see *O'Conner v. Sierra Nevada Company*, 24 Beav. 435; where the plaintiff had gone abroad for purposes connected with the suit. In that case, upon the plaintiff's return, the order was discharged.

The recent act, (22 Vic., ch. 33,) has effected a material change in the practice of the court as to granting or refusing security for costs. The fact that the plaintiff has not any fixed place of abode within the province will not be sufficient to warrant an order for that purpose where it is shewn that he has property within the jurisdiction, per *Esten*, V. C. (*White v. White*, Grant's Chamber Rep. 48.) The judge, too, is bound to take notice of the territorial division of the province; for in *McDonald v. Dicaire*, Grant's Chamber Rep. 34, which was an application for security for costs, the bill stated the plaintiff to be resident in the parish of *Rigaud*, in the county of *Vaudreuil*, and per the *Chancellor* it was held that as by the Prov. Stat. 19 Vic., ch. 152, the whole province having been set off into territorial divisions the court was bound to take notice of such subdivision of the country as that act makes, and that therefore security for costs should be given.

The plaintiff, in *Cliffe v. Wilkinson*, cited *supra*, was allowed to pay £120 into court instead of giving security; and see *Australian Steamship Company (limited) v. Fleming*, 4 K. & J. 407; and *Fellowes v. Deere*, 3 Bea. 353, where a proper sum

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SECURITY FOR COSTS.

[ORDER V., SEC. V.]

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was allowed to be paid into court. This practice has been followed in our own court, by allowing a deposit of £100 into court, in place of giving security by bond.

If a married woman sues by a next friend, he must be able to give security for costs. (*Hind v. Whitmore*, 2 K. & J. 458; s. c., 25 L. J. 394.) It seems, however, that the latter rule does not hold good in an infant's suit. (*Ibid.*) As to this point, however, see *Lindsay v. Tyrrell*, 24 Beav. 124; s. c., 3 Jur. N. S. 1014; s. c., 5 W. R. 617; on appeal, 2 DeG. & J. 7; s. c., 6 W. R. 143.

If the next friend of an infant or married woman be resident out of the jurisdiction, security will be ordered. (*Alcock v. Alcock*, 5 DeG. & Sm. 671.)

The next friend of a married woman will also be ordered to give security on the ground of poverty, though within the jurisdiction; (*Stevens v. Williams*, 1 Sim. N. S. 545; *Hind v. Whitmore*, 2 K. & J. 458; 25 L. J. Ch. 394;) so that next friend be insolvent, he will be removed; (*Waters v. Peters*, 8 U. C. L. J. 328; *Pennington v. Alvin*, 1 S. & S. 264; *Wale v. Salter*, Mos. 47, 86;) see, however, *Crace v. Crace*, (Eng.) 1 U. C. L. J. 38; where an application to remove a next friend of a married woman on the ground of poverty was refused, he having been allowed to remain on the record for six months without objection. The foregoing rule as to the next friend of a married woman does not apply to infants. (*Fellows v. Barrett*, 1 Keen. 119.)

If the next friend of a married woman retires during the suit, he will have to give security for the costs already incurred, and also to find a surety to join him; (*Payne v. Little*, 22 L. J. 1037;) so if the next friend of infants dies, security will be ordered if the infants are all resident out of the jurisdiction, but such order will be discharged on the appointment of a new next friend resident within the jurisdiction. (*Parks v. Brown*, 4 U. C. L. J. 282.)

A married woman, defendant, (though her husband be a co-defendant,) applying on her own behalf for security, must do so by next friend. (*Pearse v. Cole*, 16 Jur. 214; *Cooney v. Girvin*, *Grant's Cham. Rep.* 94; s. c., 8 U. C. L. J. 187.)

When a bill is filed by a next friend on behalf of an infant, the address of the next friend must be fully set out. (*Major v. Arnott*, 2 Jur. N. S. 80; s. c., 4 W. R. 229.)

In *Hardwicke v. Warren*, 2 Ir. Eq. R. 156, the practice was laid down that if the plaintiff do not comply with the order within a reasonable time the proper course is to apply on motion that he give the security before a certain day, and in default, that his bill should stand dismissed without costs. But see *Giddings v. Giddings*, 10 Beav. 29, (and cases there cited,) where the application was granted with costs, and following these decisions *Wood v. Grey*, per *Esten*, V. C., 8 Oct., 1856. The time is in the discretion of the court, and may be enlarged, (*Ibid.*) per *Esten*, V. C., 3rd Decr., 1856.

In *O'Grady v. Munro*, 7 Grant, 106, the plaintiff, a British subject, having gone to reside in the United States, where he had remained for several years, but had never taken any oath of naturalization, or exercised the rights of citizenship in that country, returned to this province, and some months afterwards filed a bill in this court, a motion for security for costs was refused although several persons swore that his intention was to leave immediately on the decision of the case, the plaintiff having sworn that his intention was to remain in the country.

Where upon the death of a sole plaintiff residing out of the jurisdiction, and as against whom the defendant had waived his right to security for costs, the bill was revived by his legal personal representative, who also resided out of the jurisdiction, the defendant was held entitled to the usual order for security for costs. (*Jackson v. Davenport*, 7 Jur. N. S. 1224; 30 L. J. Ch. 272; 9 W. R. 356.)

SECURITY FOR COSTS—PARTIES TO SUITS.

[ORDER V., SEC. V., AND ORDER VI.]

If the order cannot be obtained upon *præcipe*; and it will have been seen that it can only so be obtained when it appears upon the face of the bill that the plaintiff is *resident* out of the jurisdiction, then a notice of motion must be served upon the plaintiff's solicitor for an order that security may be given upon the evidence disclosed in an affidavit which must be filed in the regular way before notice is served in support of such application, such affidavit must be mentioned in the notice of motion.

The deputy-master in the county where the bill is filed is to hear and dispose of all applications relating to security for costs, see post Order XLIV., sec. 4.

The bond must be given to the registrar or deputy-registrar where the bill is filed, see Order XLIII., sec. 6.

In *Roaf v. Topping*, Grant's Cham. Rep. 14, which was an application by the defendants to be at liberty to sue on the bond given for security for costs, the plaintiff being resident out of the jurisdiction, *Spragge*, V. C., required the decree to be produced to shew that the defendants were ordered to receive their costs, and in *Stokes v. Crysler*, Grant's Cham. Rep. 14, which was a similar application, *Esten*, V. C., required the party moving to shew a demand from, and refusal of the costs by, the sureties named in the bond before making the order asked.

PARTIES TO SUITS.

VI. The practice of setting down a cause on an objection for want of parties merely, is abolished.

Defendant not to
take objection
for want of parties
in any of the following
cases:

SEC. 2.—It shall not be competent to any defendant in any suit to take any objection for want of parties to such suit, in any case to which the rules next hereinafter set forth extend.

RULE 1.—Any residuary legatee, or next of kin, may have a decree for the administration of the personal estate of a deceased person, without serving the remaining residuary legatees or next of kin.

RULE 2.—Any legatee interested in a legacy charged upon real estate; or any person interested in the proceeds of real estate directed to be sold, may have a decree for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds of the estate.

(d) A residuary legatee of the suit, although he has been so named.

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PARTIES TO SUITS.

[ORDER VI., SEC. II.]

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RULE 3.—Any residuary devisee or heir may have the like decree, without serving any co-residuary devisee, or co-heir. (d)

RULE 4.—Any one of several *cestuis que trust*, under any deed or instrument, may have a decree for the execution of the trusts of the deed or instrument, without serving any other of such *cestuis que trust*. (e)

RULE 5.—In all cases of suits for the protection of property pending litigation, and in all cases in the nature of *waste*, one person may move on behalf of himself, and of all persons having the same interest.

RULE 6.—Any executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate, or the execution of the trusts.

In all the above cases the court, if it shall see fit, may require any other persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper; and may make such order in any particular case as it may deem just for placing the defendant on record on the same footing in regard to costs as other parties having a common interest with him in the matter in question.

But court may order other persons to be made parties;

may give the conduct of the case to any party,

and regulate the costs.

(d) A suit may be proceeded with without making the real representatives of residuary legatees who have died abroad before the institution of the suit, parties to the suit, although the devisees themselves have through ignorance of their death been so named. (Bateman v. Cooke, 1 W. R. 242.)

(e) So one *cestui que trust* may without serving his co-*cestui que trust* have a decree for the appointment of new trustees. (Jones v. James, 9 Hare, App. lxxx.) It seems, too, that the rule applies to a bill to make a trustee responsible for a breach of trust. (McLeod v. Annesley, 22 L. J. Ch. 633, 637; s. c. 17 Jur. 608; 16 Bea. 600.) But vid. Jesse v. Bennett, 6 DeG. M. & G. 609; 26 L. J. Ch. 63.

PARTIES TO SUITS.

[ORDER VI., SEC. II.]

All necessary parties to be served with an office copy of the decree.

In all the above cases the persons who, according to the present practice of the court, would be necessary parties to the suit, are to be served with an office copy of the decree, (*f*) and after such service they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and upon service of notice upon the plaintiff, they may attend the proceedings under the decree; any party so served may apply to the court to vary, or add to the decree, within fourteen days from the date of such service. (*g*)

RULE 7.—In all suits concerning real or personal estate (*h*) which is vested in trustees (*i*) under a will, settlement or otherwise, such trustee shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such case it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but, on the hearing the court, if it shall think fit, may order such person or persons, or any of them, to be made parties. (*k*)

(*f*) From the English practice it would appear that a Judge in Chambers will direct who are the proper parties to be served; (*De Balinhard v. Bullock*, 9 Hare, App. xiii.) and that the rule as to serving parties applies to infants, (*Clarke v. Clarke*, 20 L. T. 88; s. c. 1 W. R. 48,) and to parties out of the jurisdiction. (*Chalmers v. Laurie*, 10 Hare, App. xxvii; s. c. 1 W. R. 265.)

(*g*) By the English practice, when a party served with such decree feels himself aggrieved thereby, he should move the court on notice for leave to file a bill in the nature of a bill of review. (*Kidd v. Cheyne*, 18 Jur. 848.) Service of an office copy decree for sale or otherwise in a suit does not make decree binding on a judgment creditor, who is not a party to the cause, (*Knight v. Pocock*, 24 Beav. 436; s. c. 27 L. J. Ch. 297; 4 Jur. N. S. 197; 30 L. T. 126,) and as to this rule generally. (*Doody v. Higgins*, 9 Hare App. xxxii; s. c. 2 Jur. N. S. 1068.) The practice followed by our court is for the master to whom the reference under the decree has been made to give the direction. See order XXXIV., for the endorsement to be made on the office copy of the decree served.

(*h*) The operation of this rule is not confined to administration suits. (*Fowler v. Bayldon*, 9 Hare, App. lxxviii.—comp. *McLeod v. Annesley*, 22 L. J. Ch. 637; s. c. 17

Jur. 608 given to 1 W. R. represent 24 L. J., hold the tions in by V. C. v. Stoneh held that though the children e Fowler v. dee1, to tr mortgagee adult cestu the filing cestuis que vit of the t at the sam App. xxi. 1

But the 10 Hare, A tatives of s 189.) In o suit for fore Jur. 170; E held that th apparently, fied is repr to put a g sale of mor will, framed the settleme marriage ou marriage wor App. xlii.) to set aside a property, ins of whom had concurred, su G. M. & G. 6

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Jur. 608; 16 Bea. 600.) In applying it generally, the court will exercise the discretion given to it by the concluding clause. Thus in *Tudor v. Morris*, 22 L. J. Ch. 1051; s. c. 1 W. R. 426, it was held that the trustees of mortgage property did not sufficiently represent their *cestuis que trusts* in a suit for foreclosure; *Comp. Cropper v. Mellersh*, 24 L. J., Ch. 430; where it was observed by V. C. *Stuart* that the court would only hold the section to apply to foreclosure suits in extraordinary cases. The observations in *Cropper v. Mellersh*, were however commented upon with disapprobation, by V. C. *Wood*, in *Wilkins v. Reeves*, 3 W. R. 305—and in a similar suit, *Goldsmith v. Stonehewer*, 9 Hare, App. xxxvii.; s. c. 22 Law J. Ch. 109; 17 Jur. 199, it was held that infant *cestuis que trusts* were sufficiently represented by their trustees, although the rule was not extended to adult *cestuis que trusts* except as to the shares of children entitled in remainder vested in the trustees under a settlement. (*Comp. Fowler v. Bayldon*, ante.) So also, where an equity of redemption was granted by deed, to trustees upon trust for certain parties, some of whom were infants, and the mortgagee filed a bill for foreclosure against the trustees of the settlement, and the adult *cestuis que trusts* only, as defendants, upon the death of one of the latter after the filing of the bill, the court made a decree for sale, in the absence of the infant *cestuis que trusts*, and of the representative of the deceased defendant, upon an affidavit of the trustee of the settlement, that it would be for the benefit of the infants, and at the same time ordered the proceeds to be paid into court. (*Siffken v. Davis*, Kay, App. xxi. marginal note.)

But the rule does not apply where the trustees have disclaimed, (*Young v. Ward*, 10 Hare, App. lviii.,) nor ordinarily, where the surviving trustees or the representatives of such as are dead only are made parties. (*Stansfield v. Hobson*, 16 Beav. 189.) In cases where the executors of a deceased mortgagor are also parties to a suit for foreclosure (*Sale v. Kitson*, 3 De G. M. & G. 119; s. c. 22 L. J. Ch. 344; 17 Jur. 170; *Hannam v. Riley*, 9 Hare, App. xl.; s. c. 22 L. J. Ch. 110;) it has been held that the *cestuis que trusts* need not be joined in the suit, upon the ground, apparently, that the whole property out of which the mortgage is to be satisfied is represented. (*Sale v. Kitson*, ante.) Possibly the court may be disposed to put a greater latitude upon this section in suits for the foreclosure and sale of mortgaged property. On a bill for the execution of the trusts of a will, framed according to the old practice, it was held that the trustees of the settlement of the share of one of the residuary legatees made on her marriage ought to be parties, but that under the above rule, the children of the marriage would be sufficiently represented by them. (*Densem v. Elworthy*, 9 Hare, App. xlii.) But trustees do not sufficiently represent their *cestuis que trusts* on a bill to set aside a settlement. (*Read v. Prest*, 1 Kay & J. 183.) In a suit to restore trust property, instituted by the representatives of a trustee, against his co-trustee, both of whom had committed breaches of trust, in which some of the *cestuis que trusts* had concurred, such *cestuis que trusts* were held necessary parties. (*Jesse v. Bennett*, 6 De G. M. & G. 609; 26 L. J. Ch. 63; see, too, *Devaynes v. Robinson*, 24 Beav. 86, 99.)

Where a mortgage has been executed to trustees for the benefit of creditors, the creditors are not necessary parties to a bill filed by the trustees to foreclose. (*Fraser v. Sutherland*, 2 Grant, 442.)

So where the owner of an equity of redemption assigns it to trustees for the benefit of creditors, the creditors are not necessary parties to a bill of foreclosure. (*Dalton v. McNider*, 1 U. C. L. J. 57; *Shaw v. Liddell*, 1 U. C. L. J. 57.) Where a property became vested in trustees under an absolute deed intended as a mortgage, on a suit to redeem against such trustees it was held that one of the trustees being beneficially interested, the *cestuis que trusts* were sufficiently represented. (*Kerr v. Murray*, 6 Grant, 343.) Where property has been assigned to trustees for the benefit of creditors, and a suit is brought by or against the trustees in respect of a debt due to the assignor, the creditors are unnecessary parties. (*O'Connell v. Charles*, 2 Grant, 489.)

Where a bill is filed against trustees by parties claiming adversely to the *cestui que trust*, the *cestui que trust* is a necessary party, and it is the duty of the trustee to object that the *cestui que trust* is not before the court, and if the objection is not made the court will at the hearing direct an amendment. (*Cleveland v. McDonald*, 1 Grant, 415.)

In a suit by trustees to reduce into possession the trust estate, and in which the defendant answers and calls in question the existence of the trust estate, the *cestuis que trust* will become necessary parties. (*Houlding v. Poole*, 1 Grant, 206.)

Where a party who has executed a deed to trustees and seeks to set it aside as having been obtained by fraud the *cestuis que trust* must be parties and that although some of them have released their interest under the deed, and others had not any part in obtaining it. (*Rogers v. Rogers*, 2 Grant, 137.)

To a bill filed by a partner in an insolvent partnership against his co-partner to set aside a marriage settlement as having been made by the co-partner when insolvent, the trustees and *cestuis que trust* are necessary parties, as being entitled to have the accounts of the partnership taken and the assets applied in exoneration of the settled land. (*Thomas v. Torrance*, Grant, Cham. 46.)

(i) Executors with a power of sale are within the section, (*Shaw v. Hardingham*, 2 W. R. 657,) and where there was a devise to trustees subject to the payment of debts, with a general residuary devise over, the general residuary devisee was held to be an unnecessary party to a suit to carry the trusts of a will into execution. (*Smith v. Andrews*, 4 W. R., 353.) In a late case, (*Bolton v. Stannard*, 27 L. J. Ch. 845; 3 C. 4 Jur. N. S. 576; 6 W. R. 570,) where there was only an implied power of sale in the executrix, *Sir John Romilly*, M. R., held that she was not a trustee within the section.

(k) Notwithstanding the above rules it would seem that when an estate is to be sold under the decree of the court, all persons interested in the property ought, if possible, to be made parties to the suit, or at least to be served with an office copy of the decree. (*Doody v. Higgins*, 9 Hare, App. xxxii.) Where in an administration suit, persons believed by the plaintiff to be the next of kin of the testator were not on the record, but the plaintiff alleged that he intended to serve them with a decree, a demurrer to the bill for want of parties was overruled. (*Snepp v. Snepp*, 4 Jur. N. S. 202; s. c. 6 W. R., 355.)

RULE 8.—In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable. (l)

(l) The regulations concerning parties embodied in this order are contained in the English act to amend the practice of the Court of Chancery. (15 & 16 Vic., ch. 86.) Section 2 of this order corresponds in great part with the 42nd section of that act.

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PARTIES TO SUITS—SUBPŒNA TO APPEAR, &c.

[ORDER VI., SEC. II., AND ORDER VII.]

15

Rule 1.—This rule is the same as the English rule.

Rule 2.—And this also. It will be observed that in this case the decree extends to the *personal* estate alone. If relief is required against the *real* estate, this rule will not apply.

Rule 3.—This rule again applies exclusively to *personal* estate.

Rule 4.—This rule follows the English rule. In this case the decree sought for must be simply an execution of the trusts of the deed or instrument. (*McLeod v. Annesley*, 16 Bea. 607; *Jones v. James*, 9 Hare, App. 80.) If any declaration is sought for respecting the administration of the property, or any relief which might affect the interest of other *cestuis que trust*, the case will not come under this rule.

Rule 5.—Also follows the English rule.

Rule 6.—Embodies English rules No. 6, 7, and 8.

Rule 7.—This rule is English rule 9.

As to this rule, see *Stanfield v. Hobson*, 16 Bea. 189; *Sale v. Kitson*, 8 DeG. M. & G. 119, and cases there cited; *Young v. Ward*, 10 Hare, App. 58.

All necessary parties other than provided by this order (VI.) should be made at or before the hearing, and not added in the master's office, merely to remedy a defect arising from the carelessness or negligence of the plaintiffs. (*Patterson v. Holland*, 6 U. C. L. J. 256.) In this case, however, such parties were allowed to be added in the master's office, the defendants having had two opportunities of making the objection, which they neglected.

To a bill filed by the municipal council of an incorporated town to prevent injury to the property of the municipality, the Attorney-General is not a necessary party. (*Guelph v. Canada Co.*, 4 Grant, 632.)

Such executors as have proved may sue without making the other executors parties, although they have not renounced. (*Forsyth v. Drake*, 1 Grant, 228.)

In all cases which cannot be brought within the terms of the foregoing rules, the old practice must prevail, and the person suing must bring before the court all the persons interested in the estate, the subject of his suit. The cases referring to the question of parties under the former practice in suits concerning real estate must necessarily be referred to. (*Finch v. Finch*, 2 Ves. Sr. 492; *Herring v. Yor*, 1 Atk. 390; *Pyncent v. Pyncent*, 3 Atk. 571; *Mitford* 173; *Lord Cholmondeley v. Lord Clinton*, 2 J. & W. 1; *Hopkins v. Hopkins*, 1 Atk. 590; *Lloyd v. Johnes*, 9 Ves. 58; *Carte v. Ball*, 3 Atk. 500.)

SUBPŒNA TO APPEAR AND ANSWER.

VII. The writ of subpœna to appear and answer a bill of complaint is hereby abolished. (m)

Subpœna to appear and answer abolished.

(m) As to old practice, vide *Daniell's C. P.* 3rd Edit. 298 et seq.

APPEARANCE—BILL OF COMPLAINT; ITS FORM.

[ORDERS VIII. AND IX.]

APPEARANCE.

Appearances
abolished.

VIII. In future no appearance is to be entered in any suit, either by the defendant or by the plaintiff on his behalf.

BILL OF COMPLAINT.

Bill of com-
plaint: its form.

IX. A bill of complaint is to be in the form of a petition, addressed to the Chancellor. (n) It must contain:

1. The name and description of each party complainant. (o)
2. The name of each party defendant.
3. A statement of the plaintiff's case in clear and concise language. (p)
4. A prayer for the specific relief to which the plaintiff supposes himself entitled; but the prayer for general relief may be added.

(n) By order 5 of the Orders of Court promulgated on the 10th January, 1863, it is provided that, "after the 1st day of February, next, all bills of complaint and petitions are to be addressed, 'To the Honorable the Judges of the Court of Chancery.'"

(o) The proper place of abode and description of the plaintiff must be given, otherwise he will be ordered to give security for costs. (Dan. Chy. Practice, vol. 1, p. 249, and cases there cited.) See also *Manby v. Bewicke*, 2 Jur. N. S. 671, (Lord's Justices,) where *Bailey v. Gundry*, 1 Keen, 53, is confirmed.

(p) The order as to the form of a bill, and as to what it must contain, (and having regard therefore to the requirements of this order, and to the forms of bills in the several cases enumerated in schedule A. appended thereto,) is very explicit.

It must still be borne in mind, however, that certain material parts of a bill are necessary, and which are not specifically alluded to in the order.

Every bill must show clearly that the plaintiff has the right to the thing demanded, or at least such an interest in the subject matter as gives him the right to institute the suit concerning it; if otherwise, the defendant could demur; and this rule applies not to one plaintiff only, but to all the plaintiffs. The interest, moreover, in the subject-matter must be an actually existing interest, a mere possibility, or even probability, of a future title will be insufficient to sustain a bill; and the plaintiff must also make it appear that he has a proper title to institute a suit concerning it. This practice is laid down in *Mitford on Pleading*, 5th Ed. 177, 188.

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To put the rule more fully. The plaintiff must shew:

- (a) That he is the person entitled to the relief, assuming that the facts justify any relief.
- (b). He must shew that the facts entitle him to the relief prayed against some person.
- (c). He must shew that the defendant or defendants, is or are the person or persons against whom he is entitled to relief.
- (d) He must shew that the court has jurisdiction to grant the relief prayed.

The plaintiff must therefore allege,

- (a) His title distinctly to the subject matter; if he be the owner, he must show that he is, or so far at least as to have a *locus standi* for some relief; he must allege the facts from which the court, assuming them to be true, can collect that he has title, and the allegation should consist of those facts or instruments, or portions of instruments, from which the title appears, and thereupon to follow up those allegations by a specific allegation of the legal inference.
- (b) The plaintiff must shew that the facts alleged shew his title to relief. Every fact necessary to complete the chain of title, not merely title to estate but title to relief, must be stated with accuracy and precision. The bill must be divided into paragraphs and numbered consecutively, and each paragraph should be confined to a specific fact or class of facts. (This is required by the 4th order of the Orders of the 13th of April, 1859.) No costs will be allowed when the order is violated.

The prayer should be in conformity with the case made by the bill; its office is to show to what relief the plaintiff considers himself entitled: what is the decree that he seeks to obtain. The prayer should, like the bill, be divided into paragraphs, according to the several kinds of particular relief asked, and the last paragraph must always be the prayer for general relief.

The facts relied upon must be distinctly averred; thus the plaintiff being described as a shareholder is not sufficient. If the circumstance of his being a shareholder is necessary to be proved, the fact should be distinctly alleged. (*Walburn v. Ingilby*, 1 M. & K. 61.; *Banks v. Parker*, 16 Sim. 176.) If the plaintiff's case is, that there has been fraudulent conduct on the part of the defendant, a general allegation of fraud will not be sufficient. It must be shown in what the fraud consists. (*Kelly v. Rogers*, 1 Jur. N. S. 514.) So with respect to general charges of collusion between two or more defendants. (*Bothomley v. Squires*, 1 Jur. N. S. 694, V. C. K.) As to a general charge of defendant being trustee. (*Steedman v. Marsh*, 2 Jur. N. S. 391, V. C. W.; 4 W. R. 476.) If an allegation will bear two meanings, it should be borne in mind, that the defendant is entitled to put that construction on the statement in the bill which is most against the plaintiff's interest. (*Vernon v. Vernon*, 2 M. & Stansbury v. Arkwright, 6 Sim. 481; *Hammond v. Messenger*, 9 Sim. 327;) and made by the defendant. The presumption is always against the pleader, because the plaintiff is presumed to state his case in the most favourable way for himself, and therefore, if he has left any thing material to his case in doubt, it is assumed to be in favour of the other party. (*Lord Cottenham, C., Columbine v. Chichester*, 2 Phil. 28; *Attorney-General v. Mayor of Norwich*, 2 My. and Cr. 422, 423; *Vernon v. Vernon*, 2 My. and Cr. 145; *Bowes v. Fernie*, 8 My. & Cr. 632.)

BILL OF COMPLAINT; ITS FORM.

[ORDER IX.]

As to prayer for relief, see *Dan. Prac.* vol. 1, 226, 264; *Hiern v. Mill*, 13 *Ves.* 114; *Kerrick v. Saffery*, 7 *Sim.* 817; *Hanbury v. Litchfield*, 2 *M. & K.* 634; *Hell v. The Great Northern Railway Company*, 5 *De. G. M. & G.* 66; *s. c.*, 18 *Jur.* 685.

The prayer for relief, where the bill is for discovery merely, should be omitted, but when it had by mistake been added to such a bill, it was held that it was not alone sufficient to convert the bill into a bill for relief. (*South Eastern Railway Company v. The Submarine Telegraph Company*, 23 *L. J.*, Ch. 188; *s. c.* 17 *Jur.* 1044; 2 *W. R.* 81.)

The plaintiff cannot, at the hearing, rely upon facts proved by evidence which are not alleged upon the face of his bill. See *Gordon v. Gordon*, 3 *Sw.* 400, 472; *Skarf v. Soulbey*, 1 *M. & G.* 365.

Husband and wife.—The wife is joined as a co-plaintiff with her husband, where he is entitled to the legacy or other subject matter of the suit in her right. Where she is entitled for her separate use, she must sue by her next friend making her husband a defendant, but if he is out of the jurisdiction, it will be sufficient to charge that fact, and to name him as a defendant, "when he shall come within the jurisdiction," but in the case of *Platel v. Craddock*, 1 *C. P. Cooper*, 469, where the bill had been filed in the joint names of the husband and wife in respect of a trust fund limited to the wife for life for her separate use, with remainder to the husband for life, the court at the hearing allowed the bill to be amended by adding the name of a next friend to the female plaintiff. See also *Davis v. Prout*, 7 *Beav.* 288, 291; *Mcadowcroft v. Campbell*, 13 *Beav.* 184. The next friend must be a substantial person, capable of paying costs. (*Hind v. Whitmore*, 25 *L. J. Ch.* 394.)

Infants.—See *Dan. Ch. Pr. vol. i.*, p. 72, as to suits on behalf of infants. The bill must contain the address and description of the next friend, (*Major v. Arnott*, 2 *Jur. N. S.* 80, *V. C. K.*.) but the rule applicable to a suit by a married woman, that the next friend must be a person of substance, does not hold in an infant's suit. *Hind v. Whitmore*, 2 *Kay and J.* 458.)

Assignees of bankrupt.—In general a bankrupt or an insolvent debtor cannot sustain a bill in respect of property vested in his assignee under his bankruptcy or insolvency, although he alleges a surplus, and that there is collusion between the assignee and the person possessed of the property. (*Heath v. Chadwick*, 2 *Ph.* 649; *Rochford v. Battersby*, 2 *H. L. Cases*, 388; 14 *Jur.* 229; *Bradberry v. Brooke*, 4 *W. R.* 658; *V. C. K.*, 4 *W. R.* 699.) See, however, *Wearing v. Ellis*, which was a suit by an insolvent debtor, 2 *Jur. N. S.* 1149; *s. c.* 26 *L. J. Ch.* 15; 6 *De G. M. & G.* 596; affirming decision of *V. C. Stuart*, 2 *Jur. N. S.* 204.)

Assignee of debt.—The assignee of a debt, cannot, unless some impediment exists in the way of his recovering his debt at law by using the creditor's name, maintain a suit in equity. (*Hammond v. Messenger*, 9 *Sim.* 327; *Rose v. Clarke*, 1 *Y. & C. C. C.* 534; *Sewell v. Moxey*, 2 *Sim. N. S.* 189; *s. c.* 16 *Jur.* 608; *Clark v. Cort*, 1 *Cr. & Ph.* 154.)

If judgment at law be assigned, the assignor as well as the assignee must be a party, for the legal right of action remains in the assignor. (*Cathcart v. Lewis*, 1 *Ves. Jr.* 468; *Blake v. Jones*, 3 *Anstr.* 651; *Ryan v. Anderson*, 3 *Mad.* 174; *Edney v. Jewell*, 6 *Mad.* 165; *Partington v. Bailey*, 6 *L. J. Ch.* 179; *Boomer v. Gibson*, Registrar (Grant's) notes, 21 *Mar.*, 1854.)

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BILL OF COMPLAINT; ITS FORM.
[ORDER IX.]

19

In the several cases enumerated in schedule A., hereunder written, the bill of complaint may be in the form, or to the effect, set forth in that schedule as applicable to the particular case; and, in cases not enumerated in that schedule, forms of pleading similar in principle may be adopted, whenever a more detailed statement is not necessary for the full developement of the case. (q)

(q) The following are the forms of the bill of complaint enumerated in schedule A., which for convenience of reference are introduced here instead of in the appendix.

SCHEDULE A.

FORM OF BILLS.

1. By a legal or equitable mortgagee, or person entitled to a lien as a security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.

IN CHANCERY.

A. B. }
and }
C. D. }
and }
E. F. }
and }
G. H. }

(Enumerate all the parties plaintiffs.)

Plaintiffs.

(Enumerate all parties defendants.)

Defendants.

CITY OF TORONTO,
(or the county town
selected for the examina-
tion of the witnesses)

To THE HONORABLE, &c.

Humbly complaining, shews, &c., A. B. of &c., (a) that under and by virtue of an indenture (or other document) dated, &c. (b) and made, &c., (and a transfer thereof, made by indenture, dated, &c., and made, &c.,) the said A. B. is a mortgagee (or, an equitable mortgagee) of (or, is

(a) The description must be fully set out or the plaintiff will be required to give security for costs; as to which see cases cited *ante*. When a bill is filed by a next friend on behalf of an infant, the address of the next friend must be fully set out. (Major v. Arnott, 2 Jur. N. S. 80; s. c. 4 W. R. 229.)

(b) The names only of the parties are to be set out, not the substance or effect of the document.

In framing a bill for foreclosure or redemption all that is necessary to state to avoid demurrer is such a case as will warrant the court to refer it to the master to enquire as to the amount actually due. So a demurrer to a bill of foreclosure on the ground that it did not allege that the plaintiff had paid a valuable consideration for the mortgage, was overruled. (Kingsmill v. Gardner, 1 U. C. Jur. 2, 325.)

The wife of a mortgagor who has barred her dower is an improper party to a foreclosure suit, and if made one the bill will be dismissed against her with costs. (Moffatt v. Thomson, 3 Grant, 111; apparently overruling *Saunderson v. Caston*, 1 Gr. 349.)

BILL OF COMPLAINT; ITS FORM.

[ORDER IX.]

entitled to hold a lien upon) certain freehold property (or leasehold, or other property, as the case may be) therein comprised, being (insert a general description of the property) for securing the sum of £—— and interest; that the time for payment thereof has elapsed; that £—— has been paid on account of principal, and £—— on account of interest; (or that no sum has been paid on account of either principal or interest;) that your orators have not been in the occupation of the premises, or any part thereof; (or, that your orators have been in the occupation of the premises, or of some part thereof, from the —— day of —— in the year —— to the —— day of —— in the year;) that there is now justly due upon the said security, for principal, £——, and for interest £——. That E. F. and G. H., the defendants hereto, are entitled to the equity of redemption of the said mortgaged premises (or, the premises subject to such lien.) Your orators therefore pray that they may be paid the said sum of £—— and interest, and the cost of this suit; and in default thereof that the equity of redemption of the said mortgaged premises may be foreclosed, (or, that the said mortgaged premises may be sold, or that the premises subject to such lien may be sold, as the case may be, and the produce thereof applied in or towards the payment of the said debt and costs, and that the said E. F. and G. H. may be ordered to pay the balance of the said mortgage debt and costs, after deducting the amount realized by such sale,) and for that purpose that all proper directions may be given and accounts taken (and for further relief.) (c)

Where a mortgagee has assigned *all* his interest under the mortgage, he is an unnecessary party to a bill of foreclosure by his assignee, though the mortgagor alleges that the mortgagee has been paid in full. (*Gooderham v. DeGrassi*, 2 Grant, 135.)

Where a mortgagor becomes bankrupt, his assignees (and not he) are the proper parties to a suit to foreclose; (*Torrance v. Winterbottom*, 2 Grant, 487;) so where he becomes bankrupt in England by force of the Imperial Act 12 and 13 Vic., Ch. 106, sec. 143. (*Goodhue v. Whitmore*, 7 U. C. L. J. 124.)

The judgment creditors (under *fi. fa.* lands) of the mortgagee are necessary parties in a foreclosure suit. (*Sanderson v. Ince*, 7 Grant, 383.)

Where a bill has been filed before the 18th May, 1861, respecting property in which judgment creditors have an interest as such, the suit enures to their benefit and will keep their judgments alive, although they do not re-register their judgments or place any *fi. fa.* in the sheriff's hands, and although they are not actually parties to the suit, (*Commercial Bank v. Woodcock*, 9 Grant, 141,) see also, *Buckley v. Ryan* 7 U. C. L. J. 322; and see further as to parties to foreclosure suits *Forsyth v. Drake*, 1 Grant, 223; 2 Spence Eq. Jur. 694-8; and *Fisher on Mortgage*, 187, 227.

(c) This paragraph should be omitted in a bill for discovery in aid of defence at law. As to prayer for general relief, see *Hill v. The Great Northern Railway Company*, 5 De G. M. & G. 66; s. c. 18 Jur. 685, where it was held that under such a prayer relief inconsistent with the allegations in the bill will not be granted.

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BILL OF COMPLAINT; ITS FORM.
[ORDER IX.]

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2. By a judgment creditor, who has registered his judgment, seeking a sale, or otherwise to enforce his charge or lien.

IN CHANCERY.

A. B. *Plaintiff.*
and
C. D. *Defendant.*

CITY OF TORONTO,
(or the county town selected for the examination of the witnesses.) } To THE HONORABLE, &c.
late of _____ } Humbly complaining, &c., your orator, &c., that in _____ term, in the year _____ your orator, (or G. H., assignee, under an assignment, dated, &c., and made, &c., or of whose executor or administrator, or administrator *de bonis non*, your orator is the assignee under, (d) &c.,) recovered a judgment in the court of _____ against C. D., the defendant herein named, for the sum of £ _____, in an action theretofore brought by your orator against the said C. D., which judgment was duly registered in the registry of the county of _____, on the _____ day of _____, at which time the said C. D. had divers lands, tenements and hereditaments in the said county, and that the said C. D. is now the owner of the same lands, tenements and hereditaments, subject to the said judgments. Your orator therefore prays that he may be paid the amount of the said judgment, together with interest thereon, and his costs of this suit, or in default thereof that the said lands, tenements and hereditaments, or a competent part thereof, may be sold for the satisfaction thereof, and the proceeds of such sale applied accordingly; and for that purpose that all proper directions be given and accounts taken. (e)

(d) The character of the plaintiff must be described, without detailing the transactions whereby he acquired such character.

(e) The act (24 Vic. Ch. 41, 1861,) entitled "An Act to repeal the laws relating to the Registration of Judgments in Upper Canada," and whereby it is enacted (sec. 10) "that no judgment, rule, order, or decree for the payment of money of any court in Upper Canada, shall create or operate as a lien or charge upon lands or any interest therein," and whereby all statutes authorising the registration of judgments, decrees, and orders for the payment of money in Upper Canada, were thereby repealed; has abrogated and rendered obsolete this form of pleading.

3. By a person entitled to the redemption of any legal or equitable mortgage, or any lien, seeking to redeem the same.

IN CHANCERY.

A. B. *Plaintiff.*
and
C. D. *Defendant.*

CITY OF TORONTO,
(or the county town selected by the plaintiff for the examination of the witnesses.) } To THE HONORABLE, &c.
dated the _____ day of _____ } Humbly complaining, &c., your orator, &c., that
hereinafter mentioned—that is to say, an indenture dated the _____ day of _____, the will of _____, dated the _____ day of _____ your orator is entitled to the equity of redemption of certain freehold property (or leasehold, or

BILL OF COMPLAINT; ITS FORM.

[ORDER IX.]

other property, as the case may be) therein comprised, being (here describe the property shortly) which was originally mortgaged (or pledged) for securing the sum of £——— and interest; and that C. D., the defendant hereinafter named, is now, by virtue of the said indenture, dated the —— day of ——, (and of subsequent assurances,) the mortgagee of the said property, (or holder of the said lien,) and entitled to the principal money and interest remaining due upon the mortgage; (or lien;) and your orator believes that the amount of the principal money and interest now due upon the said mortgage (or lien) is the sum of £———, or thereabouts; and he has made, or caused to be made, an application to the said C. D. to receive the said sum of £———, and any costs justly payable to him, and to re-convey to your orator the said mortgaged property, (or property subject to the said lien,) upon payment thereof, and of any costs due to him in respect of this security, but that the said C. D. has not so done. Your orator therefore prays that he may be let in to redeem the said mortgaged property, (or property subject to the said lien,) and that the same may be re-conveyed (or delivered up) to him, upon payment of the principal money and interest, and costs due and owing upon the said mortgage; (or lien;) and for that purpose that all proper directions may be given and accounts taken.

4. By a person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.

IN CHANCERY.

A. B. Plaintiff.

and

C. D. Defendant.

CITY OF TORONTO,
(or the county town selected for the examination of the witnesses.)

To THE HONORABLE, &c.

Humbly complaining, &c., your orator, &c., that from the —— day of —— down to the —— day of ——, he and C. D., the defendant hereinafter named, carried on the business of —— in co-partnership, under certain articles of co-partnership, dated the —— day of —— and made between (parties,) (or under a verbal agreement made between your orator and C. D., or through their respective agents, E. F. and G. H.,) on the —— day of ——; and he says that the said co-partnership was dissolved (or expired, as the case may be) on the —— day of ——. Your orator therefore prays that an account of the partnership dealings and transactions between your orator and the said C. D. may be taken, and the affairs and business of the said partnership wound up and settled under the direction of this court, and for that purpose that all proper directions may be given, and accounts taken.

5. For dissolution of a co-partnership.

IN CHANCERY.

A. B. Plaintiff.

and

C. D. Defendant.

CITY OF TORONTO,
(or the county town selected for the examination of the witnesses.)

To THE HONORABLE, &c.

Humbly complaining, &c., your orator, &c., that your orator and C. D., the defendant hereinafter named, are and

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BILL OF COMPLAINT; ITS FORM.

[ORDER IX.]

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have been, since the _____ day of _____ co-partners in the trade or business of _____ under certain articles of co-partnership, dated &c., (or under a verbal agreement made between them, on the _____ day of _____,) which partnership was to continue for _____ years; (or for an indefinite time;) that the said business was carried on under the said agreement until _____ without any difficulty, (here state the facts relied on as warranting dissolution, as) that from the last mentioned day, until the present time, the said C. D. has greatly misconducted himself in the said business, by removing the books of the co-partnership from the shop or counting-house of the said firm, and denying your orator, or debarring him from access thereto; by discharging the clerks and servants of the said firm, and engaging others in his own interest in their room; by making false entries in the said books, or improperly keeping the same; all which was done with the view and has had the effect of excluding your orator from his due share in the management of the said business; by using the name of the firm for his own private purposes, and applying the moneys of the partnership to his own individual use; that there is nothing in the said articles, or in the said agreement, to justify such conduct; and your orator has made frequent applications to the said C. D. to desist therefrom, and to act in accordance with the said agreement and with his duty as a partner, but without effect; on which account your orator, on the _____ day of _____ gave notice to the said defendant that the said partnership should be dissolved from the _____ day of _____. Your orator therefore prays that the said partnership may be dissolved, and that the accounts of the said business may be taken from the commencement thereof, and the affairs thereof wound up and adjusted, and that your orator may have (such further relief, &c.)

6. Bill by a person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance.

IN CHANCERY.

A. B. Plaintiff.

and

C. D.

CITY OF TORONTO, } To THE HONORABLE, &c.
(or the county town selected for the examination of the witnesses.)

Humbly complaining, &c., your orator, &c., that by an agreement, dated the _____ day of _____ and signed by C. D., the defendant hereinafter named, the said C. D. contracted to buy of your orator (or to sell to him) certain freehold property (or leasehold, or other property, as the case may be) therein described or referred to, for the sum of £_____; and that he has made or caused to be made to the said C. D. an application specifically to perform the said agreement on his part, but that he has not done so. Your orator therefore prays that the said agreement may be specifically performed, and for that purpose that all proper directions may be given, he the said A. B. hereby offering to perform the said agreement specifically on his part.

7. Bill for the specific performance of a parol agreement partly performed.

IN CHANCERY.

A. B. Plaintiff.

and

C. D.

CITY OF TORONTO, } To THE HONORABLE, &c.
(or the county town selected for the examination of the witnesses.)

Humbly complaining, &c., your orator, &c., that on the _____ day of _____ your orator being seised in fee

BILL OF COMPLAINT; ITS FORM.

[ORDER IX.]

simple in possession (or C. D., the defendant hereinafter mentioned, being or pretending to be seised in fee simple in possession, or in fee tail, or for years, or in remainder expectant upon the determination of a certain estate for the life, &c., as the case may be) (f) of lot number ———, your orator and the said C. D. entered into a verbal agreement for the sale and purchase of the said premises, at or for the price or sum of £——— payable by equal annual instalments, with interest, upon the payment whereof a proper conveyance was to be executed of the said premises, free from incumbrances: (here state acts of part performance, as) that your orator, or the said C. D. was accordingly admitted, and entered into possession of the said lot, and has continued in possession thereof ever since, and is still in possession thereof, and has made divers and considerable improvements thereon, and has paid the sum of £———, part of the said purchase money; and your orator submits that under the circumstances aforesaid the said agreement has been partly performed, so as to entitle your orator to a specific execution thereof; for which purpose your orator has made frequent applications to the said C. D., but without effect. Your orator therefore prays that the said contract may be specifically performed by the said C. D., your orator being ready and willing and hereby offering to perform the same in all respects on his part, and that your orator may have such further and other relief, &c.

8. Bill to stay waste.

IN CHANCERY.

A. B. Plaintiff,
and
C. D. Defendant.

CITY OF TORONTO, }
(or the county town se- } To THE HONORABLE, &c.
lected for the exami- }
nation of the witnesses.) }
of until the present time, seised in fee simple (or in tail, or for life in possession, or remainder expectant upon the determination of an estate for the life of, &c., under and by virtue of an indenture of settlement, dated, &c., or possessed for the remainder of a term of ——— years, under and by virtue of an indenture of demise, dated, &c., and made &c.) of lot number ———; and C. D., the defendant hereinafter named, is in possession of the said lot, as tenant, for a term of ——— years, (or from year to year, or at will) of your orator, under and by virtue of an indenture of demise (or an agreement, dated, &c., and made, &c.) between your orator (or E. F. deceased, whose estate has come to your orator by descent, or devise, or purchase, or under and by virtue of his last will, dated, &c.) and the said C. D. (or G. H., whose estate has come to the said C. D. by operation of law, as executor, or administrator, or assignee in bankruptcy or insolvency of the said G. H., or by devise or purchase, under and by virtue of the will of the said G. H., or an indenture of assignment, dated, &c., or as tenant for life, impeachable for waste, under and by virtue of the aforesaid indenture of settlement) has, since the ——— day of ——— committed waste on the said lot, by cutting down and removing from the said lot, and applying to his own use, a large number of the timber and other trees standing, growing and being thereon, and quarrying a large quantity of stone, being on and part of the said lot, and by pulling down, &c., houses, &c., and

(f) If either party fills a representative character, say that the said ——— died on the ——— day of ———, and the said ——— is his executor, or administrator, or heir-at-law.

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BILL OF COMPLAINT; ITS FORM.

[ORDER IX.]

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he continues and threatens and intends to continue to commit such waste as aforesaid, and other waste and destruction on the said lot, although frequently requested by your orator to desist therefrom. Your orator therefore prays that the said C. D. may be restrained by the order and injunction of this honorable court from committing such waste as aforesaid, or any other waste, spoil, or destruction on the said premises, and may account, &c., and that your orator may have such further and other relief in the premises.

9. Bill to stay trespass in the nature of waste.

IN CHANCERY.

A. B. Plaintiff.
and

C. B. Defendant.

CITY OF TORONTO,
(or the county town selected for the examination of witnesses.)

To THE HONORABLE, &c.

Humbly complaining, &c., your orator, &c., that your orator was at the time of the acts hereinafter complained of, and has been since up to the present time, the owner in fee simple (or seised in tail, or for life, or possessed for the remainder of a term of years, under and by virtue of an indenture, dated, &c. and made, &c., as the case may be) and in possession of lot number _____ and that A. B., the defendant hereinafter named, has, from the _____ day of _____ until the present time, continually trespassed on the said lot, by cutting down and removing from the said lot, and applying to his own use, divers valuable timber and other trees which were growing, standing and being on the said lot, (by quarrying and removing from the said lot and applying to his own use large quantities of stone which were on and part of the said lot,) and he continues and threatens and intends to continue to trespass on the said lot, in like manner, although frequently requested by your orator to desist therefrom. Your orator therefore prays that the said defendant may be restrained by the order and injunction of this honorable court from committing the acts aforesaid, and other acts of a like nature, and may account for the value of the timber and other trees cut down, (or stone quarried,) removed and applied to his own use as aforesaid, and that your orator may have such further and other relief as may seem meet.

10. Bill by a person entitled to an equitable estate or interest and claiming to use the name of his trustee in prosecuting an action for his sole benefit.

IN CHANCERY.

A. B. Plaintiff.
and

C. D. Defendant.

CITY OF TORONTO,
(or the county town selected for the examination of witnesses.)

To THE HONORABLE, &c.

Humbly complaining, &c., your orator, &c., that under an indenture dated the _____ day of _____ and made between (parties,) he is entitled to an equitable estate or interest in certain property therein described or referred to; and that C. D., the defendant hereinafter named, is a trustee for him of such property; and that being desirous to prosecute an action at law against _____ in respect of such property, he has made, or caused to be made, an application to the said defendant to allow him to bring such action in his name, and has offered to indemnify him against the costs of such ac-

BILL OF COMPLAINT; FILING THEREOF.

[ORDER IX., SEC. 2.]

tion, but that the said defendant has refused or neglected to allow his name to be used for that purpose. Your orator therefore prays that the said A. B. may be allowed to prosecute the said action in the name of the said defendant, he hereby offering to indemnify him against the cost of such action.

11. Bill by a person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trust to appoint new trustees, or when the power cannot be exercised, and seeking to appoint a new trustee.

IN CHANCERY.

A. B. Plaintiff.

and

C. D. Defendant.

CITY OF TORONTO,
(or the county town selected for the examination of the witnesses.) } To THE HONORABLE, &c.
made between (parties,) (or will of ———, or other document, as the case may be,) Humbly complaining, &c., your orator, &c., that under an indenture, dated the ——— day of ———, and your orator is interested in certain trust property therein mentioned or referred to; and that C. D., the defendant hereinafter mentioned, is the present trustee of such property; (or, is the real or personal representative of the last surviving trustee of such property, as the case may be;) and that there is no power in the said indenture (or will, or other document) to appoint new trustees (or that the power in said indenture, or other document, to appoint new trustees cannot be exercised.) Your orator therefore prays that new trustees may be appointed of the said trust property, in the place of, &c., (or to act in conjunction with) the said C. D.

A bill of complaint is not to contain any interrogatories; all merely formal parts, except the address and conclusion, are to be omitted; and the signature of counsel may be dispensed with. (r)

(r) By Order IV., of the 13th of April, 1859, it is ordered that, "From and after the first day of July next, every bill and answer filed, and every affidavit to be used in any cause or matter, shall be written in a plain legible hand, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any bill, answer or affidavit, or part of any bill, answer or affidavit substantially violating this order; nor shall any affidavit violating this order be used in support of, or opposition to, any motion, without the express permission of the court."

Bill may be filed with a deputy registrar;

SEC. 2.—A bill of complaint may be filed either with the registrar or with a deputy registrar, at the option of the plaintiff; and the filing of a bill of complaint shall

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BILL OF COMPLAINT; FILING THEREOF.

[ORDER IX., SEC. 2.]

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have the same effect as the filing of a bill and the issuing of a subpoena to appear and answer now have; and the service upon a defendant of a bill of complaint, with such endorsement thereon as is hereinafter provided, shall have the same effect as the service upon him of a writ of subpoena to appear and answer now has. (s)

(s) By Order XLIV. of the Orders of June, 1853, ss. 2 and 3, it is provided that:—

"Sec. 2.—A bill of complaint may be filed either with the registrar, or with a deputy-registrar, at the option of the plaintiff; but all the pleadings in any cause must be filed at the same office; and where a bill is filed in the office of a deputy-registrar the endorsement thereon must be varied accordingly.

"Sec. 3.—When a bill is filed with a deputy-registrar, the deputy-master and deputy-registrar respectively in the county where such bill has been filed are to have all such powers and authorities in relation to such suit, as belong to the master and registrar respectively."

But by Order XL., of the same orders, sec. 2, it is provided that all the affidavits upon which any notice of motion is founded must be filed at the time of the service of such notice of motion; and the affidavits either in support of, or in opposition to any special motion or petition, are to be filed, as heretofore, with the registrar.

The plaintiff has *prima facie* a right to have the reference directed to the master resident in the county wherein the bill is filed. (*Macara v. Gwynne*, 3 Grant's Ch. R. 310.)

The service of a bill of complaint by this order "shall have the same effect as the service of a writ of subpoena to appear and answer now has." As to the issuing of a subpoena, see *Daniell's Ch. Pr.* 298.

The filing of a bill, or the taking of a proceeding, in which bill or proceeding any title or interest in land is brought in question shall not be deemed notice of the bill or proceeding to any person not being a party thereto, until a certificate by the registrar or a deputy-registrar of this court in the form mentioned in the act has been registered in the registry office of the county in which the land is situate, (See *Con. Stat. U. C.*, pp 59, 884.) but no certificate is required to be registered of a suit or proceeding for the foreclosure of a registered mortgage. (*Ibid.*) As to the doctrine of *lis pendens*, see *Bishop of Winchester v. Paine*, 11 Ves. 198; *Garth v. Ward*, 11 Ves. 199; s. c., 2 Atk. 175; and see also *Bellamy v. Sabine*, 1 DeG. & J. 566, 578, 584. In this latter case the doctrine is very fully discussed.

Where, however, the legal estate has been parted with, *lis pendens*, it would appear necessary to have the owner of the legal estate before the court, the power which the court has of making a vesting order might obviate this apparent necessity, as it would seem from Order XLVI., sec. 10, that such owner, though not a party, might be ordered to convey the legal estate by the court, and obedience to its order enforced by process of contempt.

Where a certificate of *lis pendens* has been registered and the bill is dismissed, it is not necessary to obtain an order discharging the certificate of *lis pendens* from the registry, the registration of the order or decree dismissing the bill being sufficient for all purposes. (*Dexter v. Cosford*, Grant's Cham. Rep. 22.)

As to this section, see also the English act, 15 & 16 Vic., ch. 86, sec. 4.

BILL OF COMPLAINT; OFFICE COPY.

[ORDER IX., SEC. III.]

An office copy of
the bill to be
served,

with the endorse-
ment in schedule
B.

SEC. 3.—In lieu of serving a defendant with a subpoena to appear and answer, an office copy of the bill of complaint is to be served upon him, with an endorsement thereon in the form, or to the effect set forth in schedule B., hereunder written. (t)

(t) English act, 15 and 16 Vic., ch. 863, sec. 3.

The following is schedule B. appended to these orders:

SCHEDULE B.

FORM OF ENDORSEMENT ON BILL OF COMPLAINT.

Your answer is to be filed at the office of the registrar, at Osgoode Hall, in the city of Toronto, (or, when the bill is filed in an outer county, at the office of the deputy-registrar at _____.)

You are to answer or demur within four weeks from the service hereof, (or, when the defendant is served out of the jurisdiction, within the time limited by the order authorising the service.) (u)

If you fail to answer or demur within the time above limited, you are to be subject to have such decree or order made against you as the court may think just, upon the plaintiff's own shewing; and, if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.

NOTE.—This bill is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above-named plaintiff, (and, where the party who files the bill is agent, add, agents of Messrs. E. F. and G. H., of _____, solicitors for the above-named plaintiff.)

Where the plaintiff sues in person, his place of residence is to be stated; and where that is more than three miles from the office where the bill is filed, an address for service must be designated in accordance with the provisions of section 3, Order XLIII.

(u) This is the time limited for the answer of a defendant where he is served with an office copy of the bill, within the jurisdiction of the court; where he is served under an order obtained for that purpose at a place out of the jurisdiction of the court, the time within which he is to answer limited by the order must be inserted in this notice, and which must be altered to conform with the order.

By Order VII. of the Orders of the 10th of January, 1863, a defendant may be served out of the jurisdiction of the court with an office-copy of a bill of complaint, (as under statute 20 Vic., ch. 56, sec. 15,) and the time within which such defendant shall be required to answer the same, or to demur thereto, is limited as therein provided. For this order see *infra*, "service out of jurisdiction."

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Order No. 4

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BILL OF COMPLAINT; SERVICE.

[ORDER IX., SEC. IV.]

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An office-copy of the bill so served under this statute and order, must be so endorsed that the time for answering or demurring correctly appears in the notice.

With reference to bills filed for foreclosure or sale, a very important change in the practice has been made by the orders promulgated on the 10th day of January, 1863. Order No. 4 of these orders provides as follows:

"DECREES FOR REDEMPTION OR FORECLOSURE OF MORTGAGES OR FOR SALE."

IV. When the time for answering in either of the above classes of cases has elapsed, on production to the registrar of the court, of the affidavit of the service of the bill, and upon præcipe, the plaintiff is to be entitled to such a decree as would, under the present practice, be made by the court, upon a hearing of a cause *pro confesso*, under an order obtained for that purpose; and on every such bill is to be endorsed the following notice:—"Your answer is to be filed at the office of the registrar, at Osgoode Hall, in the city of Toronto, (or when the bill is filed in an outer county, at the office of the deputy registrar at —.) You are to answer or demur within four weeks from the service hereof (or when the defendant is served out of the jurisdiction, within the time limited by the order authorising the service.)"

If you fail to answer or demur within the time above limited, you are to be subject to have a decree or order made against you forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.

NOTE.—This bill is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above named plaintiff, (and when the party who files the bill is agent, add agents of Messrs. E. F. and G. H. of —, solicitors for the above-named plaintiff.) And upon bills for foreclosure or sale is to be added to such notice the following: And take notice that the plaintiff claims that there is now due by you for principal money, and interest, the sum of —, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up, and that in default of payment thereof within *six calendar months* from the time of drawing up the decree, your interest in the property may be foreclosed (or sold) unless before the time allowed you as by this notice for answering, you file in the office above-named a memorandum in writing, signed by yourself or your solicitor, to the following effect: "*I dispute the amount claimed by the plaintiff in the cause*"—in which case you will be notified of the time fixed for settling the amount due by you, at least four days before the time to be so fixed.

This order is not to affect any suit now pending."

On every bill filed for foreclosure or sale of mortgaged property, must be endorsed the notice set out in the above order.

SEC. 4.—Service of an office copy of a bill of complaint upon any defendant is to be effected in the same manner that service of a subpoena to appear and answer is now effected; but it shall not be necessary to produce the original bill. Affidavits of the service of an office copy of a bill of complaint are to be in the form or to the

Mode of serving
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plaint.

BILL OF COMPLAINT; SERVICE.

[ORDER IX., SEC. IV.]

effect set forth in schedule C., hereunder written; they are to state where, when, and how such service was effected; but no copy of the bill is to be annexed. (v)

(v) This order does not apply to the service of a bill of complaint on a corporation. (Counter v. The Commercial Bank, 4 Grant's Chan. Rep. 230.)

Service on a corporation has now been specially provided for by Orders of 19th March, 1857. These are as follows:—

"THURSDAY, 19TH MARCH, 1857.

1. When service of a bill of complaint has been made within the jurisdiction of the court, upon a corporation aggregate, by personal service thereof on the mayor, warden, reeve, president, or other head officer, or on the township, town, city, or county clerk, cashier, manager, treasurer, or secretary of such corporation, or of any branch or agency thereof in Upper Canada, or other person discharging the like duties, and when no answer has been filled to such bill within twenty-eight days from the service thereof, the plaintiff may, after the expiration of twenty-eight days from the service of such bill, apply to the court, *ex parte*, for an order to take the bill *pro confesso*, and the court upon being satisfied of the due and proper service of such bill of complaint, and that no answer has been filed thereto by such corporation, may, if it think fit, order that the bill be taken *pro confesso*, against such corporation.

2. In cases where a foreign corporation aggregate, defendant to a bill of complaint, has no branch or agency in Upper Canada, then upon application to the court, supported by such evidence as may satisfy the court, in what place or country such corporation is situated, the court may order that an office copy of the bill may be served on such corporation in such place or country, or within such limits, and by personal or other service on such officer of such corporation as the court may think fit to direct. Such order is to limit a time (depending on the place of service) within which such defendant is to answer or demur to the bill, or obtain from the court further time to make defence to the bill, and where such corporation has neglected to answer or demur to such bill within the time limited by the order authorising such service, the plaintiff may apply to the court *ex parte* for an order to take the bill *pro confesso* against such corporation, and the court being satisfied of the due service of the said bill according to the exigency of such order, and that no answer has been filed for such corporation, may, if it think fit, order the same accordingly.

3. Such order to take the bill *pro confesso* does not require to be served, and all further proceedings may be *ex parte* against such defendant unless the court order otherwise.

4. This order is to apply as well to all suits and matters now depending in this court, as those hereafter to be commenced."

This order only applies to foreign corporations which have agencies in Upper Canada, and does not enable service of a bill, &c., to be effected on the agent of an Upper Canada corporation. (Campbell v. Taylor, Grant's Cham. Rep. 2.) The practice has been to allow service on any agent within the jurisdiction of a foreign corporation, but the affidavit of service must shew that it is a foreign corporation, and that the person served is an agent thereof.

The bill may be served on the defendant personally, or service may be effected by leaving the office-copy with a grown-up person at his dwelling-house. The person

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BILL OF COMPLAINT; SERVICE.

[ORDER IX., SEC. IV.]

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thus served must, however, be an inmate of the house. (Edgson v. Edgson, 3 DeG. & S. 629.) If service is effected by leaving the office-copy at the dwelling-house of the defendant, a notice of motion to take the bill *pro confesso* must be served personally on the defendant, or on his solicitor, if he have one, as directed by Order XIII., sec., 3; and three weeks' notice must be given, as provided in the last mentioned order, and see Webster v. O'Closter, 6 Grant's Chan. Rep. 278.

Service on the husband, out of the jurisdiction, is good service on the wife, (Jones v. Geddes, 15 L. J. Ch. 65,) and as to such service, under special circumstances, see Holcombe v. Trotter, 9 Jur. 637; Gee v. Cottle, 3 M. & Cr. 180; Steele v. Plomer, 1 M. & G. 83; Dubois v. Hole, 2 Ver. 618; Thomas v. Selby, 9 Bea. 194.

Service on a deputy-governor of a gaol where a defendant is a prisoner, is good service. (Newenham v. Pemberton, 2. Coll. 54; s. c., 9 Jur. 637.)

Service on one of two partners, is not good service on the other. (Young v. Goodson, 2 Russ. 255.) But substituted service will, in a proper case, be ordered, (Kinder v. Forbes, 2 Bea. 508,) and see the cases cited in notes to order as to substituted service.

Where service of the office-copy bill was made upon a solicitor acting on behalf of several defendants, and such solicitor gave a written undertaking to answer, but afterwards made default in so doing, the bill was ordered to be taken *pro confesso*. (Shaw v. Liddell, 4 Grant's Chan. Rep. 352.) And see Ross v. Hayes, 6 Grant's Chan. Rep. 277, in which case a two days' notice of motion for an order *pro confesso* was held sufficient, and that notice might be served upon the solicitor.

See English act, 15 & 16 Vic., ch. 86, sec. 5.

The following is the schedule C., referred to in the above order:—

SCHEDULE C.

FORM OF AFFIDAVIT OF THE SERVICE OF AN OFFICE COPY OF A BILL.

IN CHANCERY.

Between A. B. Plaintiff.
and
C. D. and E. F. Defendants.

I, G. H., of _____, in the county of _____, yeoman, make oath and say (when the affidavit is made by several deponents it is to commence,
We, G. H., of _____, in the county of _____, yeoman, and J. K., of _____, in the county of _____, gentleman, make oath and say; and first, I, G. H., for myself, make oath and say) that I did on the _____ day of _____, personally serve the above-named defendant C. D. with a paper which purported to be an office copy of the bill filed in this cause, by delivering to and leaving with the said defendant C. D., (if served otherwise than personally, say with a grown up person, (or as the case may be,) at the dwelling house of the said defendant C. D.,) the said office copy. I further say that upon the said office copy there was a certificate to the effect that the original bill in this cause had been filed at Osgoode Hall, in the city of Toronto, on the _____ day of _____, which

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[ORDER IX., SEC. IV.]

certificate purported to be signed by A. G., registrar of the court, (where the bill has been filed in an outer county state the fact accordingly,) and that each page of the said office copy was sealed with a seal similar to the one which I now look upon in the margin of this affidavit. I further say that upon the said office copy, at the time of the service thereof, there was endorsed the following memorandum—to wit, (here insert the endorsement set out in the preceding schedule.)

Service of an office copy of a bill when the defendant is out of the jurisdiction.

SEC. 5.—Where a defendant in any suit is out of the jurisdiction of the court, then, upon application supported by such evidence as may satisfy the court, in what place or country such defendant is or may probably be found, the court may order that an office copy of the bill may be served on such defendant in such place or country, or within such limits as the court may think fit to direct.

Form of the order.

Such order is to limit a time (depending on the place of service) within which such defendant is to answer or demur to the bill, or obtain from the court further time to make his defence to the bill. (w)

(w) As a general rule the court will, on a *prima facie* case being made out for its interference, exercise the jurisdiction given to it by this order. (Maclean v. Dawson, *infra*; Meiklan v. Campbell, 24 Bea. 100; s. c., 28 L. T. 351.) See also Innes v. Mitchell, 1 DeG. & J. 423; 26 L. J., Ch. 719; 5 W. R. 748; Cook v. Wood, 7 W. R. 424.

Where the evidence relied on is correspondence with the defendant, the affidavit ought to state the date of the last communication, otherwise the court is unable to judge as to the probability of the defendant having removed since his last letter. (Farry v. Davis, Grant's Cham. R. 7.) The evidence must shew that the defendant is residing at the particular place at which it is desired to serve him, by some person who knows him to be the defendant, and who has seen him residing there at a recent period, or who has received letters from him, dated at, and bearing the post-mark of, the place, and which shew that he is residing there. (*Ibid.*) But the court will not necessarily limit the service to a particular spot. (Blenkinsopp v. Blenkinsopp, 8 Bea. 612; s. c., 2 Ph. 1; Harrison v. Harrison, M. R. 15 April, 1848; Preston v. Dickinson, 9 Jur. 919.)

The evidence, moreover, must shew that the defendant was a resident at the particular place, and not merely that letters had been received from defendant dated at the place. (Kingston v. Monger, Grant's Cham. R. 18.) An affidavit shewing the defendant's residence seven weeks previously, is insufficient. (Fieske v. Buller 7 Bea. 581.) See also Preston v. Dickenson, *supra*.

No affidavit of merits is required; the court may be satisfied by an inspection of the pleadings, or by other means, whether the order should be granted. (Blenkinsopp v. Blenkinsopp, *supra*; Whitmore v. Ryan, 4 Hare, 612; Maclean v. Dawson, 27 Bea. 25; 7 W. R. 354; s. c., 32 L. T. 384; on appeal, 4 DeG. & J. 150; 7 W. R. 488; 5 Jur. N. S. 663; 88 L. T. 158.)

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BILL OF COMPLAINT; SERVICE OUT OF JURISDICTION. 88

[ORDER IX., SEC. V.]

Where several persons, even though members of the same family, are served, each must be served with a separate copy of the bill. (Jones v. Geddes, 9 Jur. 1002.)

The order must limit a time within which the defendant is "to answer or demur;" see Brown v. Stanton, 7 Bea. 582; Blenkinsopp v. Blenkinsopp, *supra*; Preston v. Dickinson, *supra*; and as reported in 9 Jur. 919; Whitmore v. Ryan, 4 Hare, 612. Care should be taken that the time be specified in the endorsement on the bill. (Baynes v. Ridge, 9 Hare, App. xxvii.; Chatfield v. Berchtoldt, 9 Hare, App. xxviii.) The endorsement on the bill should be the real time allowed for answering or demurring, otherwise the court will not grant the order *pro confesso*. (James v. Wertheimer, 5 U. C. L. J. 163.) Such an inconsistency, however, would be disregarded in the case of a substitutional service on a solicitor of the court, as he would not be misled by it. (Rainey v. Dickson, 5 U. C. L. J. 163, 164.)

By the Consolidated Statutes of Upper Canada, ch. 12, sec. 71, p. 61, it is enacted, that "An absent defendant may be served at any place out of the jurisdiction of the court, with a copy of any bill or proceeding, without an application being previously made to the court for the allowance of such service, and the service shall be allowed on proof to the satisfaction of the court that the same was duly made." (20 Vic., ch. 56, sec. 15.) Practically, however, this enactment was of no use, and the court would not, in default of answer, grant an order *pro confesso*, unless an order had been obtained and personally served, limiting the time within which the defendant was to answer; and this, even although the endorsement on the office-copy bill served had been altered so as to give the defendant the same time to answer which the court would have given him on an application under this order.

By Order VII. of the Orders of court promulgated on the 10th day of January, 1863, provision has been made, whereby the service out of the jurisdiction under the beforementioned statute (20 Vic., Ch. 56, sec. 15) can be effected, without a previous application to the court for an order limiting the time within which the defendant is to answer or demur. This order is as follows:

"SERVICE OUT OF JURISDICTION.

VII. The time within which any defendant served out of the jurisdiction of this court with an office copy of a bill of complaint shall be required to answer the same, or to demur thereto, to be as follows:

1. If the defendant be served in the United States of America, in any city, town, or village within ten miles from Lake Huron, the River St. Clair, Lake St. Clair, the River Detroit, Lake Erie, the River Niagara, Lake Ontario, or the River St. Lawrence, or in any part of Lower Canada not below Quebec, he is to answer or demur within six weeks after such service.
2. If served within any state of the United States not within the limits above described other than Florida, Texas, or California, he is to answer or demur within eight weeks after such service.
3. If served within any part of Lower Canada below Quebec, or in Nova Scotia, New Brunswick, or Prince Edward Island, he is to answer or demur within eight weeks after such service.
4. If served within any part of the United Kingdom, or of the Island of Newfoundland, he is to answer or demur within ten weeks from such service.
5. If served elsewhere than within the limits above designated, he is to answer or demur within six calendar months after such service.

BILL OF COMPLAINT; SUBSTITUTED SERVICE.

[ORDER IX., SEC. V. AND VI.]

6. The time within which any party served with any petition, notice, or other proceeding other than a bill of complaint, is to answer or appear to the same, is to be the same time as prescribed for answering or demurring to a bill of complaint, according to the locality of service.

7. Any party may apply to the court to prescribe a shorter time than is hereinbefore provided for any other party to answer or demur to a bill of complaint, or to answer or appear to any petition, notice, or other proceeding.

8. Any party may apply for leave to serve any other party out of the jurisdiction under the General Orders of this court of June, 1858.

9. Affidavits of service under this order and of the identity of the party served, may be sworn as follows: if such service be effected in any place not within the dominions of the Crown before the mayor or other chief magistrate of any city, town, or borough, in or near which such service may be effected, or before any British consul or vice-consul, or the judge of any court of superior jurisdiction. And if such service be effected in any place within the dominions of the Crown, not within the jurisdiction of this Court, such affidavit may be sworn before any the like officer, or any notary public, and in Lower Canada, before any commissioner for taking affidavits appointed under any statute of this province. And such affidavit shall be deemed sufficient proof of such service and identity without proof of the official character, or of the handwriting of the person administering the oath upon such affidavit."

Where orders for substituted service of an office copy of a bill of complaint may be obtained.

SEC. 6.—Orders for substitutional service of an office copy of a bill of complaint may be obtained in the same manner, and in such cases, as orders for substitutional service of a subpoena to appear and answer may be obtained under the present practice. (x)

(x) Before the court will direct substituted service it must be shewn that the person on whom it is sought to effect such service is the agent of the party whom he represents for the particular purpose of the suit; (Bones v. Angier, 18 Jur. 1050; s. c. 2 W. R. 609;) or at any rate for a purpose closely connected with the suit; the principle on which orders for substitutional service are granted, being that *there is reasonable ground to believe that the service will come to the party's own knowledge.* (Hope v. Hope, 19 Beav. 287; on appeal, 4 DeG. M & G. 328; s. c. 23 L. J., Ch. 682; 2 W.; R. 443, 545; Heald v. Hay, 9 W. R. 369; Sergison v. Beavan, 9 Hare, App. xxix.; s. c. 22 L. J. Ch. 287.)

Service of a bill to restrain an action at law, on the attorney of the plaintiff at law, the plaintiff being out of the jurisdiction, is good substituted service, (Sergison v. Beavan, 22 L. J., Ch. 287; Hamond v. Walker, 3 Jur. N. S. 686; Hurst v. Hurst, 1 DeG. & Sm. 694; Howkins v. Bennett, 1 Giff. 215; 2 L. T. N. S. 79; Brooker v. Smith, 4 L. T., N. S. 545,) but see Crawford v. Cooke, Grant's Cham. Rep. 57, where it was decided that the rule applies only to cases where the object of the suit is to restrain proceedings at law *only*, and not where any other relief is sought.

If a defendant is resident out of the jurisdiction, and has given a general power of attorney to some one to act for him, and the subject of the pending suit is clearly within the terms of the power, an order for substituted service may be obtained. (Forster v. Menzies, 16 Beav. 568; s. c. 17 Jur. 657; Rickcord v. Nedriff, 2 Mer. 458;

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BILL OF COMPLAINT; SUBSTITUTED SERVICE.

[ORDER IX., SEC. VI.]

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Hyde v. Forster, 1 Dick. 102;) and as to substituted service generally, *Daniell's Ch. Pr.*, 3rd ed., pp. 804 *et seq*; *Marquis of Hertford v. Suisse*, 13 Sim. 489; *Sewell v. Godden*, 1 DeG. & S. 126; *Zulueta v. Vinent*, 3 Mac. & G. 246; *Carwardine v. Wislade*, 15 Jur. 918; *Murray v. Vipart*, 1 Phil. 521; *Hobhouse v. Courtney*, 12 Sim. 140; *Morritt v. Walton*, 2 W. R. 648; *Cooper v. Wood*, 5 Beav. 391; *Weymouth v. Lambert*, 3 Beav. 333; *Webb v. Salmon*, 3 Hare, 251; *Governors of Grey Coat Hospital v. Westminster Imp. Com.* 4 Jur. N. S. 449; *Cox v. Bannister*, 8 W. R. 206; *Farrow v. White*, 1 J. & W. 648.)

An affidavit by a clerk of the plaintiff's solicitor, stating that one of the defendants had told him that he held a power of attorney from two other defendants, who were out of the jurisdiction, to enable him to sell the property, the subject of the suit, was held not sufficient for obtaining an order for substituted service on such defendant. (*Brooker v. Smith*, 30 L. J., Ch. 670; s. c. 4. L. T. N. S. 545.)

An admission by a party that he is an agent is insufficient, the fact must be proved.

Mere hearsay evidence is not sufficient proof of a defendant being out of the jurisdiction, so as to obtain an order for substituted service. (*Brooker v. Smith*, *ante*.)

An order may be obtained against one partner for substituted service on the other. (*Carrington v. Cantillon*, Buzbury 107; *Coles v. Gurney*, 1 Mad. 187; *Kinder v. Forbes*, 2 Beav. 503.) But *query*, must not the subject of the suit arise out of the transactions of the partnership. (*Kinder v. Forbes*, *ante*.)

As to service on a solicitor who has acted for a party in a former or other suit, see *Scott v. Wheeler*, 13 Beav. 239; *Norton v. Hepworth*, 1 M. & G. 54; *Hurst v. Hurst*, 1 DeG. & S. 694; *Waterton v. Croft*, 5 Sim. 602; or on a person in communication with the absent defendant. (*Christie v. Cameron*, 3 W. R. 146; *Watts v. Hughes*, 8 W. R. 292; 2 L. T. N. S. 208.)

In cases of substituted service, the original order allowing the service must be shewn to the person served. (*Jones v. Brandon*, 2 Jur. N. S. 437.) In this case *V. C. Wood* observed that the order ought to contain a direction for shewing it to the person served with the process, permitted to be served on him.

The effect of substituted service may be stated from the observations of Lord *Cottenham*, in *Gibson v. Ingo*, 2 Ph. 404, that the court intends to put the party in whose favour the order is made in the same situation as if there had been an actual service.

Leave to proceed by substituted service must always be obtained before proceeding thereto, whatever be the nature of such substituted service. (*Re. Beger*, 3 Jur. N. S. 930.) As to the evidence by which application must be supported. (*Brooker v. Smith*, *ante*, 30 L. J., Ch. 670.) The application should be made *ex parte*. (*Danford v. Cameron*, 8 Hare, 329.) And where notice of motion for substituted service on the defendant's solicitor was served on the latter, he was held entitled to payment of the costs of his appearance on the motion. (*Read v. Barton*, 28 L. T. 36.)

An order obtained under this section does not authorise service on the agent of a notice of motion to take the bill *pro confesso*, as he may in the meantime have ceased to be agent, a further order authorising service of notice of motion must be obtained.

There must be clear proof of agency in reference to the subject matter of the suit, but it is not necessary that the agent should have especial authority with reference to the suit. It should also be shewn that the defendant is out of the juris-

BILL OF COMPLAINT; ABSCONDING DEFENDANT.

[ORDER IX., SEC. VI. AND VII.]

diction, and the order for substitutional service should state that the supposed agent can within a limited time move to discharge it. (Allan v. Pyper, 5 U. C. L. J., 118.) It must be shewn, however, that the person to be served is the agent, by evidence other than the statements of the alleged agent. (Legge v. Winstanley, 8 Grant's Chancery R. 106.)

Proceedings
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SEC. 7.—In case it appears to the court by sufficient evidence that any defendant against whom a bill has been filed, has been within the jurisdiction of the court at some time not more than two years before the filing of the bill, and that such defendant after due diligence cannot be found to be served with an office copy of the bill, and that there is good reason to believe that he has absconded—in such case the court may order the defendant to answer within a time to be named in the order and may direct a copy of such order, with a notice to the effect set forth in schedule D., hereunder written, to be published in such manner as the court may think fit; and in case the defendant does not answer or demur within the time limited by such order, the court, if it shall think fit, may order the bill to be taken *pro confesso* against such defendant, in the manner hereinafter provided. (y)

(y) The following is the schedule D. referred to in these orders :

SCHEDULE D.

NOTICE IN CASE OF AN ABSCONDING DEFENDANT.

To the order directing publication the following notice is to be added :

C. D., take notice that if you do not answer or demur to the bill pursuant to the above order, the plaintiff may obtain an order to take the bill as confessed against you, and the court may grant the plaintiff such relief as he may be entitled to on his own shewing, and you will not receive any further notice of the future proceedings in the cause.

As to who is an absconding defendant, see *Cope v. Russell*, 2 Ph. 404; s. c. 12 Jur. 105; overruling s. c. 11 Jur. 1032; *Allen v. Loder*, 20, L. J. Ch. 658; *Barton v. Whitcombe*, 16 Bea. 205; s. c. 17 Jur. 81; *Crosse v. Crosse*, 8 W. R. 338. A defendant who is keeping out of the way is an absconding defendant. (*Bennett v. Powell*, 2, W. R. 667; see also, *Hele v. Ogle*, 2 Hare, 623; *Graver v. Temple*, 9 Sim. 523.)

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BILL OF COMPLAINT; ABSCONDING DEFENDANT.

[ORDER IX., SEC. VII.]

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The affidavit must show that the plaintiff has made enquiries at places and of persons where there is reasonable probability that the defendant would be heard of. (*Anstey v. Hobson*, 2 W. R. 46; *Harrison v. Stewardson*, 2 Hare, 530.) See also *Robson v. Earl of Devon*, 2 W. R. 485. A mere allegation that the plaintiff has used all possible diligence is not enough. (*Ibid.*) and in *Lipsey v. Cruise*, Grant's Ch. R. 2, in moving for an order under this section to advertise a defendant as absconding, it was held that it must be shewn that the defendant cannot be found to be served with the bill; and so also an application for such an order was refused where it was sworn that defendant had absconded to *Michigan*, but it was not shewn that the defendant could not be found there. (*Ibid.*) Where a party absconded and changed his residence several times within a few months, the court directed an advertisement to be inserted in a newspaper published at his place of residence in the province, and copies to be sent to him directed to each of the places named. (*Stimson v. Stimson*, 6 Grant's Ch. R. 379.)

Where a defendant more than two years before bill filed has been out of the jurisdiction of the court, and has no solicitor, agent, or other person within the jurisdiction, upon whom substituted service can be made, and he cannot be found or heard of out of the jurisdiction, it would appear that the plaintiff cannot, either under this order, or otherwise, obtain leave to advertise him. (*Thurlow v. Treeby*, 27 Bea. 624; 8 W. R. 159.) Such a case seems to be unprovided for by the orders.

It is quite clear that unless the defendant has been in the jurisdiction within two years before the bill filed, the court cannot under this section by way of substitution for the ordinary process of service direct advertisement. (*Ibid.*)

The Orders of the 29th June, 1861, enact as follows:

"DEFENDANT ABSCONDING OR BEING CONCEALED.

In case it appears to the court by sufficient evidence, that any defendant against whom a bill has been filed, has been within the jurisdiction of the court at some time, not more than two years before the filing of the bill, and that such defendant, after due diligence, cannot be found to be served with an office copy of the bill, and that there is good reason to believe that he has absconded from the jurisdiction, or that he is concealed within the same, the court may make such order as is prescribed by section 7th, of the 9th of the General Orders of June, 1853."

The words, "from the jurisdiction, or that he is concealed within the same," extend the application of this 7th section.

This section applies to suits of any nature. In moving for an order under this section it is not sufficient to state that enquiries and exertions had been made to serve the defendant, the affidavit must shew what exertions have been made, so that the court can judge whether the defendant is absconding or otherwise. (*Murney v. Knapp*, Grant's Cham. Rep. 26.)

The omission of the name of the defendant against whom the bill is advertised is a fatal defect. (*Jones v. Brandon*, 3 Jur. N. S. 1146.) The order should direct the notice to be inserted "at least once in every week reckoned from the time of the first insertion thereof up to the time for which the said notice is given," which will remove the doubt expressed in *Bazalgette v. Lowe*, 24 L. J. Ch. 416, reversing s. c. *id.* 368; and *Millar v. Elwin*, 25 Bea. 674; 6 W. R. 763; 4 Jur. N. S. 600. See further as to advertisements; *Baker v. Dean*, 6 W. R. 719; *Wilkins v. Hogg*, 4 L. T., N. S. 12.

In moving to take a bill *pro confesso* against a defendant who has been advertised

under this section, it is necessary to show by affidavit that he cannot be found to be served with a notice of the motion, (*Gilmour v. Matthews*, 4 Grant, 876,) and the papers in which the advertisement has been inserted must be produced and shown to the court. (*Goodfellow v. Haubly*, Grant's Cham. R. 62.)

The words, "if it shall think fit," give the court a wide discretion. (*Zulueta v. Vinent*, 15 Bea. 272.) Where therefore the defendant had always resided abroad, and there appeared no desire on his part to avoid the process of the court, the application was refused, but without costs, (*ibid.*) but see *Hele v. Ogle*, 2 Hare, 623, cited *ante*.

Care must be taken that no amendment of the bill is made pending the service in manner provided for by this section and the application for the order *pro confesso*. An order to take the bill *pro confesso* is gone, if an order be obtained to amend even a clerical error in the bill, (*Weightman v. Powell*, 2 DeG. & Sm. 570; 12 Jur. 958,) unless the application to amend be made, and it may be made *ex parte*, without prejudice to an order to take the bill *pro confesso*. (See Order XIII. of Orders of June, 1858, sec. 8.)

Proceedings
against an ab-
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discovered.

SEC. 8.—In case it appears to the court by sufficient evidence that any defendant, against whom a bill of complaint has been filed for the foreclosure of a mortgage, or respecting the specific performance of any agreement, cannot be found after due diligence, to be served with an office copy of the bill of complaint, in such case the court may order the defendant to answer or demur within a time to be named in the order, and may direct a copy of such order, together with a notice to the effect set forth in schedule D., hereunder written, to be published in such manner as the court may think fit; and in case the defendant does not answer or demur within the time limited by such order, the court, if it shall think fit, may order the bill to be taken *pro confesso* in the manner hereinafter provided. (2)

(2) For the schedule D., see notes to the last section.

This section does not apply to any but cases for foreclosure or specific performance. (*Bank of Montreal v. Hatch*, Grant's Cham. Rep. 57.) As to evidence required to sustain an application under this section, and generally as to practice thereon, see notes to section 7 of this order.

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BILL OF COMPLAINT; AMENDMENT.

[ORDER IX., SEC. IX. AND X.]

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SEC. 9.—Orders of course to amend a bill of complaint may be obtained at any time before answer upon præcipe. (a)

Order of course to amend the bill before answer.

(a) As to amending bill see Daniell's Chancery Practice, 3rd ed. 276, and English Chancery Order IX., ss. 8-24.

The time for vacation is not to be reckoned in the computation of the time appointed or allowed for the purpose of amending or obtaining orders for leave to amend: *vide* Order V., of 1853, sec. 4. And see also Order of 30th June, 1858, whereby "it is ordered that the time of the long vacation is not to be reckoned in the computation of the time appointed or allowed for the purpose of answering either an original or amended bill."

The deputy-master in the county where the bill has been filed, is to grant orders for leave to amend before replication. (*Vide* Order XLIV., of 1853, sec. 4, art. 3.)

Where a demurrer has been overruled, and an appeal from the decision is pending, the rule does not apply. (*Ainslie v. Sims*, 17 Beav. 174; and see *Cooper v. Lewis* 2 Ph. 178, and cases there cited; *Fletcher v. Moore*, 11 Beav. 617.)

The order for leave to amend operates from the day of service only, (*Price v. Webb*, 2 Hare, 515,) but service may be dispensed with on an application *ex parte* therefor. See sec. 10 of this order.

Where the plaintiff amends before answer, the time to answer or demur runs only from the service of the amended bill, (*Cheeseborough v. Wright*, 28 Beav. 173,) except as to amendment made under sec. 10.

There may be any number of such orders obtained, *before answer*. (*Wharton v. Swann*, 2 M. & K. 362.)

SEC. 10.—Service upon any defendant of an order of course to amend, before answer, may be dispensed with, upon an application *ex parte*, when the court is satisfied that such an order may be made without prejudice to the defendant's rights; and when service upon any defendant of an order to amend has been dispensed with, the cause as to such defendant is to proceed as if the bill had been originally filed in the amended form. (b)

Service of an order to amend dispensed with in certain cases;

(b) Where a plaintiff desired to amend by adding a judgment creditor who had assigned his claim to the plaintiff as a party defendant, leave was given for that purpose, dispensing with service on the defendants already before the court. (*Boomer v. Gibson*, 4 Grant, 430.)

BILL OF COMPLAINT; AMENDMENT.

[ORDER IX., SEC. XI. AND XII.]

SEC. 11.—An order to amend the bill only for the purpose of rectifying a clerical error in names, dates or sums, may be obtained at any time upon *præcipe*. (c)

to correct error
in names, dates,
or sums.

(c) An order obtained under this rule was held to render an order to take a bill *pro confesso* inoperative. (Weightman v. Powell, 2 DeG. & Sm. 570.) As to misnomers in copies of bills served on defendants, see Witham v. Salvin, 16 Jur. 420.

SEC. 12.—One order of course to amend the bill, as the plaintiff may be advised, may be obtained by the plaintiff upon a *præcipe*, at any time before filing the replication, and within four weeks after the answer, or the last of several answers has been filed: but no further order of course for leave to amend the bill is to be granted after an answer has been filed, except in the case provided for by the 11th section of this order. (d)

One order of
course after
answer.

(d) A plaintiff moving to amend after the time limited by this order, must shew that the order could not be complied with, though due diligence has been used. (McNab v. Gwynne, 1 Grant's Chan. Rep. 127.)

Where the plaintiff's solicitor absconded before the time to amend the bill, as of course, had expired, and his departure was not known to the plaintiff till afterwards, and due diligence appeared to have been used by the plaintiff to proceed with the cause after becoming acquainted with such departure, the court granted leave to amend on payment of costs. (Carney v. Boulton, 1 Grant's Chan. Rep. 423.) And where, after the time for amending, as of course, an order is obtained to amend by adding a party, "with apt words to charge him, or otherwise, as plaintiff shall be advised," the plaintiff is not at liberty to make any amendment whatever, except such as is required for the purpose of introducing the additional party. (Gillespie v. Grover, 2 Grant's Chan. R. 120.)

This section will not apply to a case where a voluntary answer (which is at once treated as sufficient) is put in. (Rogers v. Fryer, 2 W. R. 67.) A second order of course to amend will be discharged as irregular. (Bennett v. Honeywood, 1 W. R. 490; Dolly v. Challin, 11 Beav. 61.)

As to computation of time, the four weeks do not expire till twelve o'clock of the night of the last day included therein. (Preston v. Collett, 20 L. J., Ch. 228.) And an order of course, obtained after an order to amend on payment of costs, made upon a special application, is irregular. (Edge v. Duke, 10 Beav. 184.)

The last answer "means the last answer required to be put in previous to replication," (Arnold v. Arnold, 1 Ph. 806.) *i. e.*, the last of several answers filed by several defendants. (Forman v. Gray, 9 Beav. 200; Duncombe v. Lewis, 10 Beav. 278.) But see Dalton v. Hayter, 7 Beav. 586, as to which, however, compare the observations of the Master of the Rolls, in Sprye v. Reynell, 10 Beav. 351.

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BILL OF COMPLAINT; AMENDMENT.

[ORDER IX., SEC. XII. AND XIII.]

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See further as to the case of answers required from several defendants. (*Arnold v. Arnold*, 1 Ph. 805; *Bertolucci v. Johnstone*, 2 Hare, 682; *Baldwin v. Damar*, 16 L. J. Ch. 448; *Lester v. Archdale*, 9 Beav. 156; *Stinton v. Taylor*, 4 Hare, 608.)

An order of course, to amend obtained, but not served before a notice of motion to dismiss for want of prosecution, is a nullity, and is therefore no answer to the motion to dismiss. (*Jones v. Lord Charlemont*, 12 Jur. 389; 17 L. J. Ch. 449; and *Comp. Morris v. Owen*, 1 V. & B. 523.) And see as to the order to amend operating from its service. (*Price v. Webb*, 2 Hare, 515.)

One order of course, only can be obtained, and an order obtained in violation of this rule will be discharged with costs. (*Peile v. Stoddart*, 11 Beav. 591; *Horsley v. Fawcett*, 10 Beav. 191; *Bennett v. Honeywood*, 1 W. R. 490.)

An order of course, obtained after replication filed, to amend by adding parties, is irregular. (*Hitchcock v. Jaques*, 9 Beav. 192.) But *query*, may not such an order be obtained *ex parte*. See *Bryan v. Wastell*, Kay, App. xlvii.; s. c., 2 W. R. 335.

Adding a defendant is clearly an amendment within this order, and any further order can be obtained only upon special application. (*Attorney-General v. Nethercoat*, 2 My. & C. 604.)

An enlargement of the time for taking out the order to amend may be obtained; but misconduct on the part of the solicitor is no ground for allowing further time. (*Clarke v. Mayor of Derby*, 10 Jur. 978.)

See *Masterman v. Great Western Railway Company of Ireland*, 20 L. J., Ch. 43; *Macintosh v. Great Western Railway Company*, *ibid.* 550, as to application of rule till the expiration of four weeks from an answer put in by a sole defendant to an amended bill.

Where, by the order allowing a demurrer, leave is given to amend the bill, and the plaintiff afterwards neglects to amend, the proper course for the defendant is to move that the plaintiff do amend within a given time, otherwise that the order to amend may be discharged, and the demurrer allowed. (*Nelson v. Robertson*, 1 Grant's Chan. Rep. 530.)

A demurrer to a bill having been filed, the plaintiff, before the demurrer came on for argument, obtained the common order to amend; but not having amended within the time prescribed, *held*, that the bill was gone. (*Hoflick v. Reynolds*, 30 L. J. Ch. 407; 9 W. R. 431.) Where a demurrer is served and set down, and a common order to amend obtained, the plaintiff must pay the costs of demurrer also. (*Hoflick v. Reynolds*, 9 W. R. 398.) Where a demurrer is put in, and set down, that is not a case for a common order to amend. (*Id.*)

SEC. 13.—A plaintiff having obtained an order to amend his bill is to amend within fourteen days from the date of such order; otherwise the order to amend becomes void, and the case as to dismissal stands in the same situation as if such order had not been made. (e)

The bill must be amended within fourteen days.

(e) The amended bill must be served within the fourteen days, even on new defendants.

BILL OF COMPLAINT; AMENDMENT.

[ORDER IX., SEC. XIII. AND XIV.]

This rule also applies to an amendment effected by special leave. (*Cridland v. Lord de Mauley*, 2 DeG. & Sm. 560,) and includes cases where liberty is given to amend upon the allowance of a demurrer; (*Bainbrigg v. Baddeley*, 12 Beav. 152; *Armistead v. Durham*, 11 Beav. 428; s. c., 13 Jur. 380;) but see *Nicholson v. Peile*, 2 Beav. 497; where, in the latter case, the plaintiff having submitted to a demurrer, obtained an order to amend, but did not do so within the time limited; he then obtained a second order, of course, to amend, and no answer having been filed, a motion to discharge the second order was refused; in this case, however, the orders were obtained *before* answer.

Where the plaintiffs had in consequence of the misconduct of their solicitor, omitted to amend their bill within the time allowed, a motion for further time was refused; (*Clarke v. Mayor of Derby*, 10 Jur. 978;) and see *Champneys v. Buchan*, 8 Drew. 5; *Dolly v. Challin*, 11 Beav. 62; *Armistead v. Durham*, *Id.* 428; *Bainbrigg v. Baddeley*, 12 Beav. 152; but see *Carney v. Boulton*, cited *supra*.

Where a plaintiff requires an answer to an amended bill, he must serve the defendant with a copy of such bill, endorsed in the form required by the orders requiring him to answer the same. (*Barry v. Croskey*, 2 Johns. & H. 130; 10 W. R. 5.) And service of a plain instead of an endorsed copy of such an amended bill, is, in effect, an intimation to the defendant, that no answer is required of him; and subsequent service of an endorsed copy is irregular, and may be set aside on motion by the defendant; (*Id.*;) course which plaintiff should adopt to correct such an irregularity. (*Id.*)

Amendment substituted for a supplemental bill.

SEC. 14.—Supplemental bills are abolished. When a suit is defective by means of some imperfection in the bill, and not in consequence of any event arising subsequent to its institution, the court may at any time permit an amendment of the bill in furtherance of justice, and on such terms as it may think proper, for the purpose of altering the allegations in the bill, or of putting new matter in issue, as well as for the purpose of adding or striking out the names of parties, or of varying the relief prayed, or praying further relief.

Such order is to be applied for by motion, the notice of which is to state the required amendment; and must be served upon the parties, or their solicitors, unless dispensed with.

Upon the motion the court must be satisfied, by affidavit, or otherwise, of the truth of the proposed amendment, and of the propriety of permitting it to be made at the particular stage of the cause, under all the circumstances.

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[ORDER IX., SEC. XIV.]

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Upon pronouncing such order for amendment, the court is to give such direction as to the future conduct of the suit, in relation to answering such amendments, as also with regard to the evidence taken, or to be taken, and in all other respects, as the circumstances of the case may require. (*f*)

(*f*) See *Collett v. Preston*, 3 M. & G. 488. The affidavit is made by the plaintiff and his solicitor, or by the solicitor alone, in case the plaintiff from being abroad, or otherwise, is unable to join.

An affidavit by the solicitor's managing clerk has been held insufficient; (*Christ's Hospital v. Grainger*, 1 Ph. 634;) but when the facts are within the personal knowledge of the clerk, the court may require his affidavit, as well as that of the solicitor. (*Ibid.*) See too, *Handfield v. Woolley*, 4 Sim. 122.

A motion for leave to amend by striking out the name of a plaintiff, and making him a defendant, is never of course, and must be supported by the affidavit required by this section; (*Macleod v. Lyttleton*, 1 Drew. 36; *Sloggett v. Collins*, 13 Sim. 456;) and see *Lloyd v. Makeam*, 6 Ves. 145.

The affidavit need not set out all the proposed amendments, (*Payne v. Little*, 19 L. J. Ch. 459,) but it must shew circumstances from which the court can itself judge as to the materiality and diligence; (*Stuart v. Lloyd*, 3 M. & G. 181;) and see *Attorney-General v. Fishmonger's Company*, 4 M. & C. 1; *Phillips v. Goding*, 1 Hare, 40. It must shew due diligence co-extensive with the whole time from the filing of the answer. (*Winnall v. Featherstonehaugh*, 9 Jur. 1054, on appeal to L. C., 10 Jur. 285.) Where the affidavit stated, that "having regard to these circumstances, the amendments could not, with," &c., this was held sufficient; (*Attorney-General v. Corporation of London*, 13 Beav. 313;) see further as to due diligence, and the terms under which the order will be made after replication; *Champneys v. Buchan*, 3 Drew. 5.

Any application made under this section, must be made promptly, and it will have been seen, that the affidavits on which it is founded, must shew due diligence, not merely in the progress of the suit, but in the matter of the amendments. (*Edge v. Duke*, 11 Jur. 218.)

Notwithstanding this order, an application to amend at a late stage of the cause cannot be granted, if it appears that such amendment will be attended with any risk of doing injustice. (*Aitchison v. Coombs*, 6 Graat's Chan. Rep. 643, 660.)

In *Bolton v. Ridsdale*, 2 W. R. 451, V. C. *Stuart* seems to have thought that the section did not apply where the circumstances existed before the institution of the suit, but had been discovered subsequently thereto. But this case was reversed on appeal. (*Vide*, 2 W. R. 488.)

The amendments or supplemental statements must not be of such a nature as to contradict the case made by the bill; (*Tomson v. Judge*, 2 Drew. 414; 2 W. R. 574; s. c., 23 L. T. 217;) but see *Allen v. Spring*, 22 Beav. 615. But where a bill was filed asserting a legal right, which, on the hearing, the plaintiff was ordered to establish at law, it was held on appeal, reversing the decision below, that he might

BILL OF COMPLAINT; AMENDMENT.

[ORDER IX., SEC. XIV.]

introduce by amendment facts existing *before*, but discovered *after* the institution of the suit, which it was alleged would render the trial at law unnecessary; (Bolton v. Midsdale, 24 L. J. Ch. 70; s. c., 2 W. R. 488;) *vide* the case in the court below, 2 W. R. 451; but see Mollett v. Enequist, (No. 2,) 26 Beav. 466.

Query, does this section enable a *defendant*, even though he have the conduct of the suit, to file a supplemental statement. (Lee v. Lee, 9 Hare, App. xci.) When a defendant moved that the plaintiff might be ordered to enter on the record, "a statement of the defendant's marriage, and of the nature and effect of a settlement made thereon," the application was refused on the ground that such an order would be tantamount to allowing a defendant to amend a plaintiff's bill. (Langdale v. Gill, 1 Sm. & G. 24; s. c., 16 Jur. 1041; 1 W. R. 51.)

The court refused to give special leave to amend by introducing new matter, where the matter of the proposed amendment could be proved under the pleadings without such amendment. (Wilmott v. Boulton, 1 Grant's Ch. Rep. 479.)

As to amending bill at hearing of cause, in what cases allowed, *vide* Steet v. Hogeboom, 3 Grant's Ch. Rep. 128. The plaintiff upon a motion to amend will be required to satisfy the court of the truth of the proposed amendment, and as to the propriety and expediency, with a view to the ends of justice of permitting the amendment, under all the circumstances, and at the particular stage of the cause. (Applegarth v. Baker, 2 Grant's Ch. Rep. 428.)

It would seem that if the proposed amendment would, in fact, make a new bill the order to amend will not be granted, (City Bank v. Amsden, 7 U. C. L. J. 293; Street v. Hogeboom, 3 Grant 136, 145.)

Where the plaintiff moves to amend under this section he must shew that he could not amend under section 12, though he had used due diligence. (McNab v. Gwynne, 1 Grant, 127; and see Carney v. Boulton, 1 Grant, 423.)

As to the costs of amendment under this sec. each case must depend on its own peculiar circumstances, (Applegarth v. Baker, *ante*.) though amendment is allowed only in general on the payment of costs. (Chisholm v. Sheldon, 1 Grant 108.)

The court will not allow an amendment by striking out the name of a plaintiff without providing that security for costs be given. Daniell's Ch. P., 3rd edit. 457.

In Thomas v. Torrance, Grant's Chm. 46; after service of a notice of motion for decree, leave was given to amend by adding parties on payment of the costs of the application and of the motion for decree so far as it had gone. See also the remarks of the Chancellor *Blake*, in Rumble v. Moore, Grant's Chambers 59, as to the amendment where bill is defective for want of parties.

The court will frequently at the hearing, where the suit is defective for want of parties or otherwise, allow it to stand over with liberty to amend by adding parties or otherwise. (Chisholm v. Sheldon, 1 Grant, 108; see, however, Street v. Hogeboom, 3 Grant, 128, 136, 145; Aitchison v. Coombs, 6 Grant, 643, 660.)

Where a cause has been ordered to stand over at the hearing with liberty to amend by adding parties, the plaintiff has no right to amend by changing the venue, (Fenton v. Cross, Grant's Chm. 25,) or indeed to introduce any amendment unconnected with the liberty to add parties. (Chisholm v. Sheldon, 1 Grant, 294, 425; Gillespie v. Grover, 2 Grant, 120.) An amendment rendered necessary by the adding of parties, or connected strictly therewith, is allowable. (*Ibid*, 1 Grant 294.)

Where a plaintiff does make an amendment unconnected with such leave, a demurrer to the bill would not be a proper mode of objecting to the amendment. (Martin v. Kennedy, 2 Grant, 80.) The proper course is to move to expunge the amendment.

Where a cause is dismissed, their representatives may be appointed *ad litem* might be appointed. (373.)

At the hearing, stand over, with liberty to amend, still defective for want of parties. (373.)

Where a suit is dismissed, and a child born since the hearing, 10 W. R. 149.)

Amendment substituted for bills of revivor; bills of revivor and supplement. original bills in the nature of bills of revivor, or original bills in the nature of supplemental bills.

Revivor where suit abates after decree.

(a) Sections 1 and 2, as amended by order of the court, omitted from the

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Bills of Revivor of Bills of Revivor abolished.

Upon any suit dismissed, reason of some change of plaintiff or defendant, necessary to exhibit the modes provided, rescinded, in order to carry on the process, usual supplemental bills, of course upon payment of such suit, transmission of interest to party or parties who

BILL OF COMPLAINT; REVIVOR AND SUPPLEMENT.

[ORDER IX., SEC. XV. AND XVI., AND ORDER 6TH JUNE, 1862.]

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Where a cause was ordered to stand over to amend by adding parties, or if dead, their representatives, and one of the parties had died and no representative had been appointed, a motion for leave to proceed in his absence, or that a representative *ad litem* might be appointed, was refused with costs. (Williams v. Page, 27 Beav. 373.)

At the hearing a suit was found defective for want of parties, and was ordered to stand over, with liberty to amend by adding parties. It was brought on a second time, still defective for want of parties. The court dismissed it as against all the defendants. (Williams v. Page, 28 Beav. 148.)

Where a suit involves a question in which the children of the plaintiff are interested, and a child is born after the bill is filed, the court will, on the objection taken at the hearing, order the cause to stand over, with liberty to amend by bringing the child born since the institution of the suit before the court. (Leyland v. Leyland, 10 W. R. 149.)

Amendment substituted for bills of revivor; bills of revivor and supplement, original bills in the nature of bills of revivor, or original bills in the nature of supplemental bills.

SEC. 15.—[Abrogated and discharged by order of court dated the 6th day of June, 1862.]

Revivor where suit abates after decree.

SEC. 16.—[Abrogated and discharged by order of court dated the 6th day of June, 1862.] (g)

(g) Sections fifteen and sixteen of this order (No. IX.) are abrogated and discharged by order of court dated the 6th of June, 1862. These sections are omitted from the text.

The order of the 6th of June, 1862, is as follows:

"Sections fifteen and sixteen of General Order, number nine of the General Orders of this court of the 3rd of June, 1853, are hereby abrogated and discharged.

Bills of Revivor.—Bills of Revivor and Supplement, Original Bills in the nature of Bills of Revivor, and Original Bills in the nature of Supplemental Bills are abolished.

Upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, on the part of any plaintiff or defendant by devise, bequest, descent, or otherwise, it shall not be necessary to exhibit any bill of revivor, or supplemental bill, or to proceed by any of the modes provided for by the sections of General Order number nine by this Order rescinded, in order to obtain an order to revive such suit, or a decree or order to carry on the proceedings, but an order to the effect of the order to revive, or of the usual supplemental decree under the former practice of this court may be obtained as of course upon *præcipe* upon an allegation contained in such *præcipe*, of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability. And an order so obtained when served upon the party or parties who would be defendant or defendants to a bill of revivor or sup-

plemental bill according to the former practice of this court shall, from the time of such service, be binding upon such party or parties in the same manner in every respect as if such order had been regularly obtained according to such former practice of the court, and such party or parties shall thereupon become thenceforth a party or parties to the suit; provided that it shall be open to the party or parties so served within fourteen days after the service of such order to apply to the court by motion or petition to discharge such order on any ground which would have been open to him or them on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon; provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and the period of fourteen days shall have elapsed thereafter."

This order is adapted from sec. 52, of 15 and 16 Vic., cap. 86, (the English Act "For the improvement of Jurisdiction of Equity,") and it would seem to apply to suits commenced before the order came into operation, and even in cases where the abatement took place before that period. (Lowes v. Lowes, 16 Jur. 968; s. c. 1 W. R. 14; Cf. Jones v. Woods, 20 L. T. 50.)

The practice as to the manner in which abated suits may be revived as provided by the above order, (which has the same effect as a bill of revivor,) is laid down in Daniell's Ch. Practice, 3rd ed., 1154-55, 1159; as to the persons entitled to revive, p. 1178; as to the effect of revivor, p. 1181; and against whom the suit may be revived, p. 1182.

It was said that there can be no revivor after the lapse of twenty years from abatement, (Bland v. Davison, 21 Beav. 312,) but see to the contrary, Alsop v. Bell, 24 Beav. 451.

An order to revive was made against the representatives of a defendant who had demurred and died ten years after the allowance of the demurrer, leave having been given to the plaintiff to amend. (Deeks v. Stanhope, 24 L. J. Ch. 580; s. c., 1 Jur. N. S. 418.)

The common order to revive is obtained as of course, (Bonfil v. Purchas, 16 Jur. 965; s. c., 1 W. R. 12,) nor need the allegation referred to in the order be proved. (Gordon v. Jesson, 16 Beav. 440; s. c., 22 L. J. Ch. 328; Martin v. Hadlow, 9 Hare, App. lii.) but where there are special circumstances arising out of the case, a special application to the court is necessary. (Martin v. Hadlow, *ubi supra*; Phippen v. Brown, 1 Jur. N. S. 698; Goodall v. Skerratt, 1 Sm. & G., App. vii.) If obtained *ex parte*, it is of course liable to be objected to by any parties to the suit. (Jackson v. Ward, 7 W. R. 426.)

Where a *femme sole* entitled to property, which in the event of her marriage would be settled to her separate use instituted a suit respecting such property, and married after replication, but before decree, the court made an order giving her leave to name her next friend, and reviving the suit against her husband. (Trezevant v. Broughton, 5 W. R. 517.) See also Robinson v. Hewetson, 1 W. R. 100; s. c., 20 L. T. 154. But a fact inconsistent with an existing order made upon a petition cannot be introduced into the petition by amendment. (In re Keen, 7 W. R. 577.)

The words "change of interest" have been held applicable to the case of a necessary party coming into existence during the pendency of the suit. (Fullerton v. Martin, 1 Drew. 238; 1 W. R. 49; Phippen v. Brown, 1 Jur. N. S. 698; Pickford v. Brown, 1 K. & J. 643.) And in Jebb v. Tugwell, 20 Beav. 461; s. c., 24 L. J. Ch.

670; 25 L. J. Ch. 111. binding the plaintiff's defence not made. v. Palmer, 1

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BILL OF COMPLAINT; REVIVOR AND SUPPLEMENT.

[ORDER IX., ENC. XV. AND XVI., AND ORDER 6TH JUNE, 1862.]

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670; 25 L. T. 171; the principle was extended by making a supplemental order binding the interest of an infant born just before the decree, but through inadvertence not made a party to the suit. (Comp. Barrett v. White, 3 W. R. 526; Notley v. Palmer, 1 Jur. N. S. 221; 3 W. R. 201.)

Where a mortgagee, one of two co-plaintiffs, had died before decree, the surviving plaintiff was allowed to revive against the devisees and executors of the deceased. (Hall v. Clive, 20 Beav. 575. See also Smith v. Horsfall, 24 Beav. 381.)

A common order to revive a suit must be based on a true statement of facts, and will be discharged with costs as irregular, if the allegations in it are untrue. (Brignall v. Whitehead, 10 W. R. 69; 5 L. T. N. S. 801.) And an order to tax a bill of a solicitor, deceased, will be revived upon an *ex parte* motion by his executors. (Waugh, *In re*, 30 L. J. Ch. 796; 9 W. R. 775.)

Under this order it seems clear that an order of revivor and supplement may in an ordinary administration suit, but not in suits for specific performance, be obtained as of course, with the addition of the words, "that the personal representatives may admit assets or account." (Collard v. Roe, 5 Jur. N. S. 1242; Edwards v. Batley, 19 Beavan 457; 23 L. J. Ch. 872; Cartwright v. Shepherd, 20 Beav. 122.)

In Flocton v. Slee, 5 Jur. N. S. 422, 1090; s. c., 7 W. R. 398, the common order to revive was granted in favour of personal representative of a plaintiff who had died before decree; and also where he had died after decree, in Morritt v. Walton, 2 W. R. 544; and Jackson v. Ward, 7 W. R. 426; 1 Giff. 30; in which case it would seem that the language of this order is general, and applicable to every case where there has been a transmission of interest by the death of a plaintiff or defendant in a suit, and therefore it was that the court in this case made the supplemental order *ex parte*, where the sole plaintiff had died after decree. A settlement made in favour of a ward of court, and her children is also a "transmission of interest" within this order. (Atkinson v. Parker, 2 DeG. M. & G. 221; 22 L. J. Ch. 20; 1 W. R. 43.)

A suit was instituted for specific performance of an agreement, and the purchaser was ordered to complete. The purchase money was paid, and the conveyance delivered to the purchaser, and only a small sum for interest on the purchase money, and the costs of the suit, remained due. The purchaser died, and the common order to revive was obtained, but his executors refused to pay such interest and costs. The vendor thereupon filed a supplemental bill on behalf of himself and all other the creditors of the testator, praying for payment, and if the executors should not admit assets, for accounts and enquiries: held, that the simple order to revive was regular without any addition, the plaintiff having no reason to suppose that there would be any necessity for filing a supplemental bill. (Collard v. Roe, cited *supra*.)

When a plaintiff in a foreclosure suit had after decree assigned all his interest in the suit, the assignee will be allowed to revive on paying the costs thereof. (James v. Harding, 24 L. J. Ch. 749; s. c., 3 W. R. 474.)

An estate on which there were two equitable mortgages was ordered to be sold, and the produce divided according to their priorities, which, however, were not declared by the decree. Afterwards a second mortgagee instituted a second suit, claiming priority over the first, upon a title paramount to that of the mortgagor, which was discovered in the first suit. Held, that a bill of revivor was unnecessary, and relief was given in the second suit. (Langstaff v. Nicholson, 25 Beav. 160.)

This order, however, does not apply where a co-plaintiff is in such a position that he ought to be a defendant. (Jervoise v. Clark, 2 W. R. 337.)

If one of two creditors, plaintiffs in an administration suit obtain letters of admin-

[ORDER IX., SEC. XV. AND XVI., AND ORDER 6TH JUNE, 1862.]

istration *de bonis non* to the testator's estate upon the death of the executor defendant, the suit cannot be revived by the co-plaintiff against him under this order. (*Tate or Yate v. Leithead or Lighthouse*, 9 Hare, App. li.; s. c., 16 Jur. 964; 22 L. J. Ch. 9; 1 W. R. 4; 20 L. T. 59.) See, however, *Cresswell v. Bateman*, 6 W. R. 220.

Where there is a sole plaintiff and sole defendant, who dies having appointed the plaintiff his executor, the latter may obtain an order to revive under this order against the persons beneficially interested. (*Pedder v. Pedder*, 8 W. R. 15; 5 Jur. N. S. 1145; 29 L. J. Ch. 64; 6 U. C. L. J. 192.)

Where a sole plaintiff, after issue joined, and before decree, becomes lunatic, and a committee is appointed, such committee is entitled to a supplemental order under this section. (*Dangar v. Stewart*, 9 W. R. 266.)

Where a suit by a tenant for life against trustees had, after decree, become abated by his death, and his executors refused to revive; held, that another of the tenants for life who had been served with the decree, and had obtained an order to attend the proceedings, was entitled to revive and carry on the suit, without filing a supplemental bill. (*Dobson v. Faithwaite*, 5 L. T. N. S. 513.)

A suit abated by the death of the sole plaintiff, intestate, may be revived by a common order. (*Ward v. Shakeshaft*, 7 Jur. N. S. 1227; 10 W. R. 6.) Upon the death of a plaintiff in a creditor's suit the common order to revive was made in favour of another creditor whose debt had been proved and allowed, (*Inchley v. Allsop*, 7 Jur. N. S. 1181; 9 W. R. 649,) and it would appear that this would be done, even though the master had not made and signed his report in the cause. (*Id.*)

As to the practice on a special case, and the occurring necessity of revivor; see *Wilson v. Whateley*, 1 Johns. & H. 331; 7 Jur. N. S. 908; 30 L. J. Ch. 673; and *Brown, In re*, 7 Jur. N. S. 650; 9 W. R. 430.

Where, on the death of a sole plaintiff, an order is made on behalf of a defendant that the personal representative revive, or the bill be dismissed, such dismissal must be without costs. (*Hill v. Gaunt*, 7 Jur. N. S. 42.)

A defendant in an administration suit died abroad, his executors proved his will at the place of his death, but refused to prove it in England; an order was made for the appointment of a representative of the deceased. (*Bliss v. Putnam*, 29 Bear. 20; 6 Jur. N. S. 12.)

Where several incumbrancers are found by the master to be necessary parties to an administration suit, it is doubtful whether an order to revive will be granted under this order. (*Wilson v. Auchterlony*, 1 W. R. 84.)

It would seem that where the relief sought is larger than that which would formerly have been given under the usual supplemental decree, (as to which see *Mitford Pl.* 85, et seq.) it is doubtful whether the common order to revive should be obtained; see *Rudge v. Weedon*, 5 Jur. N. S. 723; 7 W. R. 519; *Scawen v. Nicholson*, 22 L. J. Ch. 632. But the mere fact that under the old practice a supplemental bill in the nature of an original bill would have been necessary, does not exclude the operation of this order; (*Cresswell v. Bateman*, 6 W. R. 220,) where suit was revived against the person entitled in remainder upon death of tenant in tail. See also *Stahle v. Winter*, 3 W. R. 580; and under the old law, *Lloyd v. Johns*, 9 Ves. 58.

It would seem that the existence of special questions, such as whether it will be for the benefit of an infant to continue an abated suit may be a reason for not

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BILL OF COMPLAINT; REVIVOR AND SUPPLEMENT.

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[ORDER IX., SEC. XV. AND XVI., AND ORDER 6TH JUNE, 1862.]

granting the order as of course on *præcipe*, see *Phippen v. Brown*, 1 Jur. N. S. 698; *Notley v. Palmer*, 3 W. R. 201; *Barrett v. White*, 3 W. R. 626; and *Goodall v. Skerratt*, 1 Sm. & G. App. vii., and *infra*.

When a suit has abated, but proceedings have been taken in ignorance of it, the court may on the cause being set down treat it as a motion, and affirm the proceedings. (*Houston v. Briscoe*, 7 W. R. 394.)

As to procedure under the old order (sec. 15.) see *Goodeve v. Manners*, 4 Grant's Ch. R. 101.

Where a suit abates after decree and the plaintiff does not revive the defendant may do so. It would seem, however, that he should give notice of his intention to the party *prima facie* entitled to revive. (*Noble v. Stowe*, 31 L. J. Ch. 385; 6 L. T. N. S. 800.)

Where a sole plaintiff dies leaving infant heirs, who *prima facie* would be entitled to revive, and they neglect to do so, the proper course of a defendant wishing to revive would seem to be, to have a guardian *ad litem* appointed to the infants and serve the guardian with notice of his intention to revive. (*Beamish v. Pomeroy*, Grant's Chm. R. 32; *Noble v. Stowe*, *ante*.)

Where after order or decree pronounced in a suit, but before it is drawn up the suit abates, the order or decree should be drawn up before reviving. (*Beamish v. Pomeroy*, *ante*.)

It will be observed that section 14 of Order IX., provides for the amendment of a bill where the suit is defective by reason of some imperfection in the bill, and not in consequence of any event arising subsequent to its institution. Sec. 15, provided for the amendment where the suit became defective or abated by any event subsequent to its institution, and before final decree. Sec. 16 made provision for amendment after final decree. These two latter sections of Order IX. having been repealed, and the order of the 6th of June, 1862 promulgated in their place, it would seem, having regard to English decisions upon the effect of the latter order, which has in some cases been held to apply to cases of abatement after decree only; that by the abrogation of section 15, no provision for the revival of suits which have become abated before decree, has been retained under this new enactment.

The decisions in England on this subject, to which attention is directed, are as follow: *Watson v. Loveday*, 3 W. R. 386; *Price v. Hamblett*, 1 W. R. 363; and see 10 Hare, App. xxxi., and note at page 72, from which it would seem that a suit may be revived before decree, under the order of the 6th of June, 1862, but that in cases where supplemental matter is sought to be introduced on the record, it must be done by supplemental bill; see, however, *Pickford v. Brown*, 1 K. & J. 643, where V. C. Wood, after consulting with the other judges, made a supplemental order against an infant before decree; and see also *Lash or Lersh v. Miller*, 4 DeG. M. & G. 841; s. c., 1 Jur. N. S. 457; 3 W. R. 397; *Hall v. Clive*, 20 Beav. 575; *Cochrane v. Phillips*, 3 W. R. 461, which seem to overrule *Price v. Hamblett*, and *Watson v. Loveday*. It is possible that the observations of the court in these two latter cases, however, did not refer to the mere revivor of suits, but to the putting in of supplemental matter.

Where a defendant dies before answer, the suit cannot be revived; (*Bland v. Davison*, 21 Beav. 312; *Williams v. Jackson*, 7 W. R. 104; 5 Jur. N. S. 264;) and under the old practice, (*Crowfoot v. Mander*, 9 Sim. 396.)

Where defendant dies after hearing, and before decree, an order of course, may be obtained. (*Petre v. Petre*, 1 W. R. 362; s. c., 21 L. T. 136.)

BILL OF COMPLAINT; REVIVOR AND SUPPLEMENT.

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Also where suit abates between hearing and delivery of judgment, decree may nevertheless be drawn up; (*Collinson v. Lister*, 20 Beav. 355, and *Belsham v. Percival*, 8 Hare, 157; and cases cited in reporter's note;) and where an issue at law had been directed, and the plaintiff died before it was tried, and no order to revive had been taken out, it was held to be no ground for a new trial. (*Bird v. Kerr*, 4 K. & J. 270.)

The order to revive should be served personally on the defendants, but where a defendant was out of the jurisdiction, substitutional service on his solicitor was allowed in *Foster v. Menzies*, 10 Hare, App. xxxvi., n.; s. c., 17 Jur. 657; and under old practice, *Hart v. Tulk*, 6 Hare, 618. So, where the defendants were very numerous; (*Morritt v. Walton*, 2 W. R. 643;) and, where estate is vested in trustees for sale; service on trustees was held sufficient without serving *cestuis que trusts*. (*Grimston v. Oxley*, 1 W. R. 100.) See also Order VI., sec. 2, rule 7.

In *Smith's Ch. Pr.*, 3rd ed., p. 736, it is laid down generally, that in cases of this kind service on the solicitor is sufficient, but there seems to be no authority for such a doctrine.

Query, if an answer or order *pro confesso* is necessary against a defendant first made party by revivor. It would seem that in England an appearance by or for him is necessary; (*Cross v. Thomas*, 16 Beav. 592; s. c., 17 Jur. 336; *Foster v. Menzies*, 10 Hare, App. xxxvi., n.; s. c., 17 Jur. 657; 1 W. R. 344; *Lowes v. Lowes*, 18 Jur. 968; and see *Smith's Ch. Pr.*, 3rd ed., 736;) but see, however, contra, *Hanbury v. Ward*, 18 Jur. 222; and *Ward v. Cartwright*, 10 Hare, App. lxxiii.; s. c., 22 L. J. Ch. 1006; 1 W. R. 520; where appearance seems to have been thought unnecessary. In *Martin v. Purnell*, 3 W. R. 395, however, executors against whom an order to revive had been obtained, were held entitled to answer.

If a party affected by the order to revive wishes to discharge it, he should apply within the fourteen days stipulated. An application to discharge an order after six months had elapsed was refused with costs. (*Deeks v. Stanhope*, 24 L. J. Ch. 580; s. c., 1 Jur. N. S. 413.)

See as to the practice where infants are made parties by revivor, and as to appointing a guardian *ad litem* to them. (*Kirkpatrick v. Fouquette*, 4 Grant's Ch. 549.)

Where, after decree, a defendant mortgaged his interest in the suit, and subsequently a decree on further directions was made, without making the mortgagees parties, they were allowed to be brought before the court under this order on *præcipe*. (*Freeman v. Pennington*, 5 L. T. N. S. 514; 31 L. J. Ch. 216.)

The practitioner will observe on a comparison of the order of June, 1862, with the section of the English act, from which it is adapted, that it is much larger in its application than the English section. The order promulgated in June, 1862, enables the revivor of a suit where the same has become abated, "on the part of any plaintiff or defendant, by devise, bequest, descent, or otherwise." These words are not in the English act, and it has been expressed as an opinion of the court, that the Order of June, 1862, is sufficiently large to bring every possible abatement within the application of the order. In the *Times Fire Insurance Co. v. Macdonell*, which suit had become abated in consequence of the company having been wound up under the Joint Stock Companies' Winding up Act and Amendment Act in England, an application was made to *Spragge*, V. C., by motion, on notice, to amend the bill by substituting the name of the official manager appointed under the authority of the said acts by the Court of Chancery in England, in place and stead of the company as plaintiff. The Vice-Chancellor doubted whether the order to revive ought not to

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SEC. 18.—
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have been taken out *procipe*, but on looking into the authorities cited, made the order as asked, observing that this case appeared to him to be the only one which would not come within the very general and extensive application of the Order of June, 1862.

As to form of order under this order, see Book of Forms, Part the Second; also *Ely v. Henaly*, 1 W. R. 190; and *Beton on Decrees*.

SEC. 17.—Bills of review are abolished. When the reversal of a decree is sought upon the ground of error apparent upon the face of the decree, that object may be attained by rehearing the cause, whether the decree has or has not been enrolled. One re-hearing may be had upon petition, signed by counsel, as in the case of an ordinary re-hearing, as well before as after the enrolment; but no petition for a second re-hearing is to be filed without leave of the court first had, upon special motion for the purpose; provided that this order is not to be construed to authorise the re-hearing of a cause in the ordinary acceptance of the term after enrolment. (h)

Bills of review abolished.

(h) Where since making an order the law has been altered on which the order was founded, the proper course is to present a petition for re-hearing, the order to be heard with the cause. (*Fleming v. Fleming*, 9 W. R. 757.)

Petition cannot be presented without the signature of counsel. (*Buckerridge v. Whalley*, 31 L. J. Ch. 416; 8 Jur. N. S. 473; 6 L. T. N. S. 312.)

The court will, on further directions, amend a defective decree as far as possible without a re-hearing. (*Robertson v. Meyers*, 1 Grant, 560.)

So where a necessary provision has been omitted in a decree the court will amend it although passed and entered, on an *ex parte* petition. (*Moffatt v. Hyde*, 6 U. C. L. J., 94.)

It would seem, therefore, that a re-hearing is not necessary except where the decree is sought to be *reversed* and not merely *amended*.

Where the decree directs sums of money to be paid reciprocally by the parties, but is silent as to setting one off against the other, that object cannot be obtained on motion, a re-hearing under this section is necessary. (*Robertson v. Meyers*, 2 Grant, 431.)

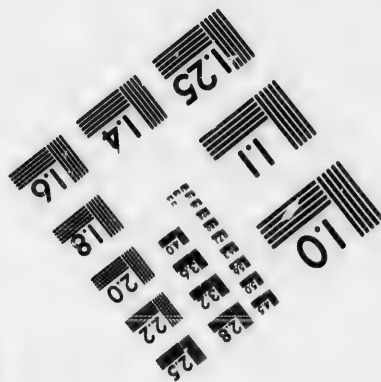
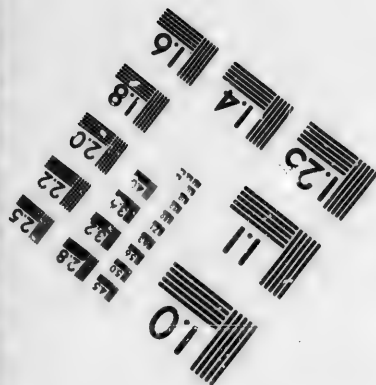
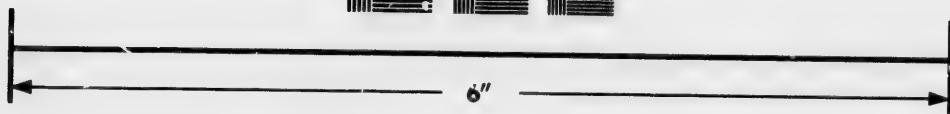
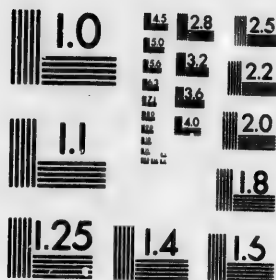
The petition should set out all the objections to the decree, for on the argument the petitioner cannot ask the decree to be varied in any particular not objected to by the petition, and on a second petition he is confined to the parts objected to by the first petition. (*McMaster v. Campton*, 5 Grant, 549.)

SEC. 18.—Bills in the nature of bills of review; bills to impeach decrees on the ground of fraud; bills to sus-





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BILL OF COMPLAINT; BILLS OF REVIEW, &c.

[ORDER IX., SEC. XVIII.]

Bills in the nature of bills of review; bills to impeach decrees for fraud; bills to suspend the operation of decrees; bills to carry decrees into execution, abolished. pend the operation of decrees; bills to carry decrees into operation, are abolished. Any party heretofore entitled to file a bill of review, praying the variation or reversal of a decree, upon the ground of matter arising subsequent to the decree, or subsequently discovered, or any description of bill by this order abolished, is to proceed by petition in the cause: this petition must pray the relief which is sought, and must state the ground upon which it is claimed. The petition is to be verified by affidavit, and must be served upon the solicitors of all parties interested; and in case any such party has no solicitor, then upon such party; and where the reversal or variation of a decree is sought upon new matter, such proof as would have been requisite upon a motion to file a bill of review must be supplied. Upon the hearing of the petition, the court, in its discretion, may either make a final order, or direct the petition to stand over, with liberty to the parties interested in sustaining the decree to file a special answer to the same; and may make such order as to the production of further proof, and the manner thereof, and the further hearing of the petition, as the court may deem meet. (i)

(i) See as to the present practice under this section, the Orders of the 9th May, 1862, which so far as they affect this section are as follow:

"A petition filed under the eighteenth section of Order IX., of the General Orders of this Court of the 3rd of June, 1853, is to be set down to be heard in court in the paper of motions for decrees. And when it is ordered that any new party or any present party may answer the petition, and that the petitioner shall be at liberty to set down the petition again, it is to be set down in like manner, and upon the copy of such petition to serve is to be endorsed the following memorandum or notice, namely: 'If you do not appear on the petition the court will make such order on the petitioner's own shewing as shall appear just,' and upon the copy which is to be served of the order to answer such petition when the court shall deem it advisable to make such order, is to be endorsed the following memorandum or notice, namely: 'If you do not answer the petition the court will make such order on the petitioner's own shewing as shall be just in your absence. And if this order is served personally you will not receive any notice of the future proceedings on such petition.' And when the party so served shall answer the petition, the same is to be set down to be heard upon notice in the same paper.

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Petitions set down to be heard under the foregoing Order, are to be set down not less than ten days before the day for which they are so set down, and notice thereof when notice is required is to be served on all proper parties, not less than seven days before such day."

A party who applies for permission to file a bill of review on the ground of having discovered new evidence, must shew that the matter so discovered has come to the knowledge of himself or his agents for the first time since the period at which he could have made use of it in the suit, and that it could not with reasonable diligence have been discovered sooner, and that the evidence is of a character that if it had been brought forward in the suit, it might have altered the judgment. (*Hosking v. Terry*, on appeal before the Privy Council, 8 Jurist N. S. 975.) See also, *Mitt. Pl.* 102, et seq., 3rd ed; *McNeill v. Cahill*, 2 Bligh. 228; *Hughes v. Hosking*, 11 Moo. P. C. 1; *Young v. Keighly*, 16 Ves. 348; *Portsmouth v. Effingham*, 1 Ves. Senr. 429; *Smith's Ch. P.*, 1 vol., 814; *Story's Equity Pleadings*, 403; *City Bank v. Bostwick*, (not reported,) 1 March, 1862, *V. C. Esten*; also *Manaton v. Molesworth*, *Wortley v. Molesworth*, 1 Eden 26, where it was laid down, that "a bill of review with matter come to the parties knowledge since the hearing, lies where the plaintiff in the bill has since the hearing discovered matter which would vary the decree; and where if such matter was known to the other party, he was not in conscience obliged to have discovered it to the court. For if the matter was known to the other party, and such as in conscience he ought to have discovered, he obtains the decree by fraud, and it ought to be set aside by original bill." See also *Kennedy v. Daly*, 1 Sch. & Lef. 355; and *Ord v. Noel*, 6 Madd. 127; where it was held that to enable a party to file a supplemental bill in the nature of a bill of review it is necessary that the new matter should be discovered after the decree, or at least after the time when it could have been introduced into the cause; and the matter should not only be new but material, and such as if unanswered in point of fact would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty as to be a fit subject of a judgment in a cause. In *Bingham v. Dawson*, 1 Jac. 248, leave to file a supplemental bill in the nature of a bill of review to introduce new evidence was refused, where the proper means of searching for it had not been used previously to the decree. See also *Kidd v. Cheyne*, 18 Jur. 348.

The decree must be contrary to the forms of the court; not merely erroneous in judgment. (*Trulock v. Robey*, 15 Sim. 265; on appeal, 2 Ph. 395; *Perry v. Phelps*, 17 Ves. 173; *Tommey v. White*, 1 H. L. Cases 160; *Gould v. Tancred*, 2 Atk. 534; *Henderson v. Cook*, 4 Drew. 306; *Green v. Jenkins*, 1 DeG. F. & J. 454; 8 W. R. 380; 2 L. T. N. S. 311; 6 Jur. N. S. 515; 29 L. J. Ch. 505.)

And as to what constitutes new matter see further, *Re Warwick and Worcester Railway Company, ex parte Kelly's executors*, 9 W. R. 329; *Hungate v. Gascoygne*, 2 Ph. 26; *Wason v. Westminster Improvement Commissioners*, 4 L. T. N. S. 80.

Should not leave be obtained before presenting petition, in the case of facts discovered since the decree. (*Henderson v. Cook*, (Eng.) 5 U. C. L. J. 71.)

SEC. 19.—No bill is to be filed for discovery merely, Bills for discovery abolished in certain cases. except in aid of the prosecution or defence of an action at law. (k)

(k) To a bill for discovery in aid of an action at law to which action the defendant has pleaded, the defendant will not be permitted to set up a legal defence in bar unless he has relied upon that defence at law. (*Peel v. Kingsmill*, 1 Grant, 584.)

A bill will not lie for the discovery of facts which the plaintiff can prove *aliunde* at law. (*Hamilton v. Phipps*, 7 Grant, 488.)

PLEAS.

X. Pleas are abolished. All defences are to be presented to the court by demurrer or answer, or both, according to circumstances.

Pleas abolished.

DEMURRER.

Demurrers, when to be filed, and how argued.

XI. A defendant may demur to a bill of claimant at any time within one month after service upon him of an office copy of the bill. Upon filing of a demurrer by a defendant, either party is at liberty to set the same down for argument immediately. (2)

(2) A demurrer is an allegation by a defendant which, admitting the matters alleged by the bill to be true, shews that they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer. Whenever any ground of defence is apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it, the proper mode of defence is by demurrer.

A demurrer may be general, that is, to the whole equity; or it may be partial, that is, that the suit is not, as to its frame, properly constituted. For the forms of demurrers, see the Book of Forms, Part the Second.

A general demurrer for want of equity admits all the facts alleged in the bill to be true; and so admitting them, submits to the judgment of the court that the plaintiff on his own shewing has no equity. The principle on which a demurrer is heard and decided is this: the court assumes to hear the cause on the bill alone, every allegation thereof being taken as proved; if the court sees that any relief, however small, might be granted, the demurrer will be over-ruled; *secus*, if the court sees that no relief whatever could be given.

A demurrer may be bad in point of form, though well founded in substance. It must be strictly confined to submission, that on the matter stated in the bill there is no equity; it must not suggest any fact or any matter not in the bill. See Mitford Pl. 107, 108; Beam. Ord. 26; Bowser v. Maclean, 9 W. R. 112; Daniell's Chan. Pr., 3rd ed., vol. 1., page 437, 438, 439; and as to the different kinds of demurrers, pp. 441, 478; Smith's Chan. Pr., pp. 288, 299; and Mitford Pl. pp. 126, 156.

A demurrer for want of equity raises the question to be determined by the court, before any further proceedings are taken in the suit, whether the plaintiff is, having regard to the case made by his bill, entitled to any relief.

In any doubtful case, the court will not decide the question raised upon the bill upon demurrer, but will overrule the demurrer, without prejudice to the question being raised by the defendant at the hearing, see *Brownsword v. Edwards*, 2 Ves. Sr. 242; *Mortimer v. Hartley*, 8 DeG. & Sm. 316, 321; *Evans v. Evans*, 18 Jur. 666; *Bowser v. Maclean*, 9 W. R. 112; *Kirwan v. Daniel*, 5 Hare, 493.

In a demurrer for the relief of the plaintiff. (*Phil. 152.*)

A demurrer for the relief of the plaintiff. (*Gen. v. Jack*) necessary to the relief of the plaintiff.

But in a demurrer for the relief of the plaintiff, shew who are the parties to the relief.

Where two demurrers are filed, the plaintiff must shew who are the parties to the relief. (*Barber v. Barber*)

An order for the relief of the plaintiff. (*Barber v. Barber*)

An infant demurrer for the relief of the plaintiff. (*Barber v. Barber*)

The Statute for the relief of the plaintiff. (*Drew. 2; Wood*)

The Statute for the relief of the plaintiff. (*Siz. 51.*)

The following demurrers for the relief of the plaintiff. (*Barber v. Barber*)

As to a demurrer for the relief of the plaintiff. (*Hyde v. Hyde*)

The rule is for the relief of the plaintiff. (*Barber v. Barber*)

As to demurrers for the relief of the plaintiff. (*24 L. J. Ch. 90*)

In *Barber v. Barber*, the objections for the relief of the plaintiff; rate demurrers;

As to setting aside a demurrer. (*Smith's Chan. Pr. 617*)

From the above

DEMURRER.

[ORDER XI.]

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In a demurrer for want of parties, if the absent parties are necessary for any part of the relief prayed by the bill, it is an objection on demurrer. (*Penny v. Watts*, 2 Phil. 152.)

A demurrer for want of parties must state who the necessary parties are. (*Atty. Gen. v. Jackson*, 11 Ves. 389.) By the same case it would appear that it is not necessary to name them.

But in a more recent case it was held that a demurrer for want of parties must shew who are the proper parties. (*Rawlings v. Lambert*, 1 J. & H. 468.)

Where two grounds of demurrer are taken, namely, for want of equity and for want of jurisdiction, they should be made the subject of distinct demurrers. (*Barber v. Barber*, 4 Drew 666; 5 Jur. N. S. 1197; 8 W. R. 16.)

An order for leave to amend not served does not prevent the defendant demurring to the bill. (*Price v. Webb*, 2 Hare, 515; 13 L. J. 50.)

An infant cannot demur until a guardian *ad litem* has been appointed. If a married woman wishes to demur alone, an order is necessary: she cannot demur separately from her husband without an order. A lunatic may demur by his committee, unless their interests are adverse; in which latter case a guardian *ad litem* should be appointed for the lunatic.

The Statute of Frauds may be set up by demurrer. (*Barkworth v. Young*, 4 Drew. 2; *Wood v. Midgley*, 5 DeG. M. & G. 44.)

The Statute of Limitations may also be set up by demurrer. (*Hoare v. Peck*, 6 Sim. 51.)

The following cases may be referred to on the question of demurrer generally to a bill for relief: *Webb v. England*, 29 P. a. 44; *Crowther v. Crowther*, 23 Bea. 308; *Threlfall v. Lunt*, 7 Sim. 627; *Bothamley v. Squire*, 3 Drew. 517; *Le Texier v. Margravine of Anspach*, 15 Ves. 164; *Angell v. Angell*, 1 S. & S. 83; *Henderson v. Cook*, 4 Drew. 306; *Morison v. Morison*, 4 Drew. 315.

As to a demurrer for multifariousness, see *Kayser v. Julian*, 2 Dick. 677; *Salvidge v. Hyde*, 5 Madd. 138; *Innes v. Mitchell*, 4 Drew. 57; *Campbell v. Mackay*, 1 M. & C. 603.

The rule is almost without exception that all the statements in the bill are admitted for the purposes of the demurrer. (*Cuddon v. Tite*, 1 Giff. 395; *Campbell v. Mackay*, 1 M. & Cr. 603; and the cases cited in *Daniell's, supra.*) For exceptions to this rule, see *Loker v. Rolle*, 3 Ves. Jr. 7; *Flint v. Field*, 2 Anstr. 543; *Taylor v. Barclay*, 2 Sim. 213; *King of Two Sicilies v. Wilcox*, 1 Sim. N. S. 301; *Daniell's Ch. Pr.* 477.

As to demurrers *ore tenus* generally, see *Rump v. Greenhill*, 20 Beav. 512; s. o., 24 L. J. Ch. 90; *Scane v. Hartick*, 7 Grant's Ch. Rep. 161. See also, *Henderson v. Cook*, 4 Drew. 306; *Couper v. Earl Powis*, 3 DeG. & Sm. 688; and *Hook v. Dorman*, 1 S. & S. 227.

In *Barber v. Barber*, 4 Drew. 666; s. o., 5 Jur. N. S. 1197, it was decided that the objections for want of equity and want of jurisdiction should be taken by separate demurrers; see also *Wellesley v. Wellesley*, 4 M. & Cr. 554, 556.

As to setting down a demurrer for argument, see *Egremont v. Cowell*, 5 Beav. 617; *Smith's Ch. Pr.* 296.

From the above order it would appear that the demurrer might be set down for

argument by either party immediately on its being filed, but it has been held that it being reasonable that the plaintiff should have an opportunity of submitting to a demurrer, if a defendant set down a demurrer immediately on the filing thereof, he will be considered to have waived his right to taxed costs on a submission to it within four days, both inclusive, see *Baldwin v. Borst*, Grant's Ch. Rep. 82. In setting down a demurrer it is not necessary to do so by petition and order as in England, the contrary practice having become established here. (*Ibid.*) And see also *Martin v. Reid*, 6 U. C. L. J. 143, as to the practice of setting down demurrers, affirming *Baldwin v. Borst*.

The costs to which a defendant is entitled, on the plaintiff submitting to a demurrer, and amending within the time limited are 20s. (*Ibid.*) The costs must be paid on serving the order to amend.

A defendant appearing at the hearing and waiving all objection to an order *pro confesso*, may shew that the bill is open to demurrer for want of equity. (*Greig v. Green*, 6 Grant's Ch. Rep. 240.)

Where a demurrer on two grounds fails as to one and succeeds as to another, it seems that no costs will be given. (*Benson v. Hadfield*, 5 Beav. 546.) This practice has been adopted in our court, see *Paine v. Chapman*, 6 Grant's Ch. Rep. 388; where a demurrer having been held good on one ground, though overruled as to the other, the defendant was allowed to answer without costs.

And where a plaintiff submits to a demurrer and obtains the common order to amend, but does not amend within the time prescribed by the order, the bill is gone. (*Hoflick v. Reynolds*, 9 W. R. 398, 431; 30 L. J. Ch. 407.) As to the form of the common order to amend, it would seem proper for it to state that in default of amendment within the time limited the bill should be dismissed. (*Ibid.*) If the plaintiff obtains the common order to amend (which it seems from the last cited case is irregular) upon payment of costs, "to be taxed," &c., he must pay the costs of the demurrer also. (*Hoflick v. Reynolds*, 9 W. R. 398.)

A demurrer to part of a bill, unaccompanied by an answer to the rest is informal and would be overruled. (*Martin v. Kennedy*, 2 Grant's Ch. Rep. 80.) See also *Barnes v. Taylor*, 4 W. R. 577; *Burch v. Coney*, 14 Jur. 1009; *Chetwynd v. London*, 2 Ves. Sen. 450; *Weatherhead v. Blackburn*, 2 V. & B. 121; *Osborne v. Jullion*, 3 Drew. 552, 596; *Hicks v. Raincock*, 1 Cox, 40; *Robinson v. Thompson*, 2 V. & B. 121; *Burton v. Robertson*, 1 J. & H. 38. From these cases it would appear, that where a defendant answers part of the bill and demurs to the rest, he must take care to distinguish precisely each part of the bill to which he demurs; he must demur to the whole bill with the exception of a particular part, but the demurrer must in that case show distinctly what is demurred to and what is answered.

A demurrer and answer under an order to answer, &c., not demurring alone, is not irregular, if the answer goes to any thing material. (*Osborne v. Jullion*, 3 Drew. 552; *Baker v. Mellish*, 11 Ves. 78; *Weatherhead v. Blackburn*, 2 V. & B. 123.)

As to the effect of allowing a demurrer without liberty to amend—see *Coningsby v. Jekyll*, 2 P. W. 300; and Lord Chancellor *Talbot* said, that "after a demurrer to the whole bill allowed, the bill is regularly out of the court, and no instance of leave to amend it." See also *Mitford*, 18-175; *Lloyd v. Loaring*, 6 Ves. 778; *Smith v. Barnes*, 1 Dick, 67; *Watkins v. Bush*, 2 Dick. 663, 701; *Baker v. Mellish*, 11 Ves. 72; *Nowell v. Andover Railway Co.*, 7 Jur. N. S. 839; *Wellesley v. Wellesley*, *supra*; *Tyler v. Bell*, 1 Keen 826; s. c., 2 M. & C. 89; *Sibson v. Edgworth*, 2 DeG. & S. 73; *Osborne v. Jullion*, *supra*; *Tryon v. Westminster*, 3 L. T. N. S. 262; *Rawlings v. Lambert*, 1 J. & H. 458; *Schneider v. Lizardi*, 9 Beav. 461; and *Holmes v. Waring*, 8 Price, 604.

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DEMURRER.—ANSWER.

[ORDERS XI., XII.]

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Where the court instead of allowing a demurrer, gives the plaintiff liberty to amend, it would seem that the plaintiff cannot take any step in the cause until he has amended; see *Chance v. Henderson*, Grant's Cham. 80; where an application under the above circumstances by the plaintiff for an order to examine the defendant on commission in Lower Canada was refused with costs.

If one defendant demurs, and the others have answered, and the demurrer be allowed, the demurring defendant may move to have his name struck out of the record with costs. (*Barry v. Croskey*, 2 J. & H. 186; 10 W. R. 76.) The proper practice would be for the plaintiff to dismiss his bill as against the demurring defendant. A demurrer allowed puts an end to a pending injunction even though liberty to amend be given, (*Schneider v. Lizardi*, *supra*.) the effect of a demurrer to the whole bill allowed being to put an end to the suit. A demurrer may be allowed without prejudice to a new bill. (*Oriental Navigation Co. v. Briggs*, 10 W. R. 125.)

Where after amendment, after demurrer allowed, a copy of the bill as amended is served without endorsement requiring answer, such service is sufficient, and it is irregular to serve the defendant a second time with an endorsed copy of the amended bill. (*Barry v. Croskey*, 10 W. R. 5.)

If a defendant put in an answer after a demurrer has been overruled, he thereby waives his right to appeal from the order overruling the demurrer. (*Simpson v. Smyth*, 1 Grant Er. & Ap. 1; 2 U. C. Jur. 129.)

Where a demurrer is overruled, time to answer can only be obtained upon a special application. (*Jones v. Saxby*, 1 Swans. 194; *Rowley v. Eccles*, 1 Sim. & S. 611; *Trim v. Baker*, 1 Sim. & S. 469.) The usual practice is to apply for an order for time to answer immediately after the demurrer has been overruled.

After demurrer overruled the defendant cannot demur again. (*Bancroft v. Wardour*, 2 Bro. C.C. 65.) But he may demur again if the bill be amended. (*Bo-sanquet v. Marsham*, 4 Sim. 573.)

As a general rule the pleader will observe that any ambiguous or inconsistent statements in a bill will, on demurrer, as indeed in any other pleading, be construed adversely to the pleader. (*Vernon v. Vernon*, 2 M. & Cr. 145.) The statements are taken strictly as they are pleaded, the defendant not being allowed to displace such statements by any inferences of facts which may not be inconsistent therewith. (*Simpson v. Fogo*, 1 J. & H. 18.)

It may be a matter of practical utility to refer to some cases, laying down as a rule the principle as to what averments will prevent a demurrer from lying to the bill. For these, see *Plumbe v. Plumbe*, 4 Y. & Coll. Ex. 360; *Bowser v. McLean*, *supra*; *Jackson v. N. Wales Railway Co.* 18 Jur. 69; *Wormald v. DeLisle*, 8 Beav. 18; *Sibson v. Edgeworth*, *supra*; *Smith v. Kay*, 30 L. J. Ch. 45, H. L.; *Bothomley v. Squire*, 3 Drew. 517; *Dent v. Turpin*, 2 J. and H. 89.

Notice of filing a demurrer must be given on the same day. See Order XIX. of the Orders of 1853.

ANSWER.

XII. Answers may be in a form similar to the form set out in schedule E. to these orders. The signature of counsel is unnecessary; but the name of the party

Form of the answer.

ANSWER; ITS FORM.

[ORDER XII., SEC. I.]

or solicitor who files the same is to be endorsed thereon, in conformity with the 2nd and 3rd sections of order XLIII. The answer is to be verified by the oath of the defendant, and the jurat is to be in the form set forth in schedule F. (m)

(m) The schedule E. is as follows:

SCHEDULE E.
FORM OF AN ANSWER.
IN CHANCERY.

A. B. Plaintiff.
and
C. D. and E. F. Defendants.

The answer of C. D., one of the above-named defendants, to the bill of complaint of A. B., the above-named plaintiff.

"In answer to the said bill I, C. D., say as follows:"

"I believe that the defendant E. F. does claim to have a charge upon the farm and premises comprised in the indenture of mortgage of the _____ day of _____, in the plaintiff's bill mentioned.

"Such charge was created by an indenture dated, &c., made between myself of the first part, &c.

"To the best of my knowledge, remembrance and belief, there is not any other mortgage, charge, or incumbrance affecting the aforesaid premises."

Such statements as are considered necessary or material are to be introduced with as much brevity as may consist with clearness; and where a defendant seeks relief under section 4 of Order XII., the answer is to ask the special relief to which he thinks himself entitled.

ENDORSEMENT.

This answer is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above-named defendants (and, where the party who filed the answer is agent, add, agents of Messrs. E. F. and G. H., of _____, solicitors for the above-named defendants.)

Where the party defends in person the answer must be endorsed, in conformity with the 3rd section of Order XLIII.

Schedule F. is as follows:

SCHEDULE F.
FORM OF JURAT TO ANSWER.

The defendant C. D. on the _____ day of _____, appeared before me at my chambers in _____, and signed the foregoing answer in my presence,

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ANSWER; ITS FORM.

[ORDER XII., SEC. I.]

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and thereupon was sworn before me that he had read the said answer and knew the contents thereof, and that the same was true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believed it to be true.

IN THE CASE OF AN ILLITERATE PERSON.

The defendant C. D., not being able to read or write, E. F., solicitor (or clerk to the solicitor) for the said defendant, was sworn before me at my chambers in _____, on the _____ day of _____, that he had truly and faithfully read the contents of this answer to the said C. D., and that he appeared perfectly to understand the same; and the said C. D. was thereupon sworn that he heard the said answer subscribed by him with his mark read over to him by the said E. F., and that he knew the contents thereof, and that the same was true of his own knowledge, except as to matters which are therein stated to be on his information, and as to those matters he believes it to be true.

As to the general nature of answers, and form thereof, see Daniell's Ch. Pr. 3rd ed., vol. 1, p. 578.

The answer is to consist of a clear and concise statement of such defence or defences as the defendant may desire to make. (n) To state the defence concise.

(n) The most usual course of defence to a bill, is by answer.

A defendant is only bound to answer as to questions of *fact*; questions being in effect questions of *law* he may pass over; but it is more usual in drawing an answer to submit them to the court.

An objection for want of parties may be taken by answer as well as by demurrer; and it is more usual to take the objection by answer, than to demur simply for want of parties. It is a prudent and a proper course to do so, for this reason, that the court does not look with favour on a demurrer for want of parties. The objection can also be taken at the hearing, and that too, whether it appears on the face of the bill, or upon the matter averred by the answer. The court, however, on a bill being so objected to, usually orders the cause to stand over, with liberty to the plaintiff to amend.

The answer may be read as evidence by the plaintiff for himself against the answering defendant, but cannot be read by a defendant as evidence for himself, except upon the question of costs.

The remarks as to the frame of a bill, apply equally to answers.

A defendant cannot call witnesses to prove any substantive issue that he has not raised by his answer. Hence the frequent necessity of averring new matter not averred in the bill, destructive of, or qualifying the equity claimed by the plaintiff.

An answer is a full defence as to both law and fact; therefore every objection which can be taken by demurrer, may also be taken by way of answer. By the answer the pleader can answer as to the facts, and conclude by submitting that on the face of the bill there is no equity. When, however, an objection of this sort is taken by the answer, it is usual to crave that the defendant may have the same benefit as if he had demurred to the bill.

Persons *sui juris* answer in their own names. A married woman, answering in respect of an interest vested in her husband in her right, answers jointly with him, and it is in effect the answer of her husband. But if she answers in respect of her separate estate, or if for any reason she answers separately, she answers in her own name. An infant answers by his guardian; and a lunatic, so found by inquisition, by his committee. A person of unsound mind, not so found by inquisition, answers by his guardian *ad litem*, appointed by the court.

The answer of a defendant must be in the first person, and divided into paragraphs numbered consecutively, each paragraph containing as nearly as may be a separate and distinct allegation. See Orders of 13th April, 1869, sec. 4.

A defendant must raise by his answer every defence upon which he intends to rely, for he cannot, as a general rule, avail himself of any defence which appears only in his evidence, and is not stated in his answer. (*Stanley v. Robinson*, 1 R. & M. 527; *Harrison v. Borwell*, 10 Sim. 380.) See also sec. 4 of this order.

The defence of a "purchaser for valuable consideration without notice" must be distinctly set up in the answer, otherwise it will not avail; so it was disallowed where set up for the first time by affidavit used on a motion for decree. (*Phillips v. Phillips*, 8 Giff. 200; affirmed on appeal, 31 L. J. Ch. 321.)

On the swearing of the answer, the same should be enclosed by the commissioner in an envelope and sealed with his seal, signed with his name, and addressed to the registrar or deputy registrar with whom the same is to be filed, and should be thereupon regularly transmitted to him for filing. Where an error was discovered in an answer after it was sworn, but before it was filed, the original jurat was ordered to be cancelled and the answer to be filed as re-sworn. (*Attorney-General v. The Governors of Donnington Hospital*, 22 L. J. Ch. 707; s. c., 17 Jur. 206.) And see also, *Patrick v. Blackwell*, 17 Jur. 808; and as to correcting the title of an answer, see *Thatcher v. Lambert*, 5 Hare, 228; and *Attorney-General v. Corporation of Worcester*, 2 Ph. 8.

If the answer be not transmitted for filing in manner above mentioned, the same will be irregularly filed, unless the oath of messenger is waived by the opposite party, who by endorsement on the answer can waive the transmission in the regular way.

An answer in which a misnomer occurs will be ordered to be taken off the files as no answer. (*Griffiths v. Wood*, 11 Ves. 62; *Cope v. Parry*, 1 Madd. 83; and *Fry v. Mantell*, 4 Beav. 485.)

An answer in other respects properly intitled was ordered to be filed though the words "to the bill of complaint of the above named plaintiff" were omitted. (*Rab-beth v. Squire*, 10 Hare App. iii, s. c., 22 L. J. Ch. 639.) The answer of the Canada Company should be verified as follows: "Sealed with the seal of the attorneys of the Canada Company, this — day of —, A. D. 1862."

An answer sworn out of the jurisdiction without a commission having been issued to take the same is irregular and cannot be filed except by consent, as without oath. (*Crawford v. Polley*, Grant's Cham. R. 8.) It seems not to be a valid objection to the filing of an answer, that it was sworn to before an office copy of the bill had been served. (*Ibid.*)

If the defendant neglects to answer within the month, and the bill is taken *pro confesso* against him, the court will nevertheless set aside the order and let him into answer, if application is made within a reasonable time before decree: the defendant, however, will be required to shew what answer he wishes to put in, and to pay the costs occasioned by the order *pro confesso*. (*Daniell's Ch. Prac.* 3rd ed., 371, 372;

Williams v. 142; Lovell C., July, 1869, of Order X.

Notice of order XIX for want of

An answer on motion

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Williams v. Thompson, 2 Bro. C. C. 279; s. c., 1 Cox, 418; *Carr v. Paulett*, 7 Sim. 142; *Lovell v. Hicks*, 1 Y. & Coll. 230; *Dickson v. Canada Company*, *Spragg v. C.*, July, 1862, not reported.) As to answering after decree *pro confesso* see sec. 6 of Order XIV., of Orders of June, 1858.

Notice of filing answer must be given on the same day on which it is filed; (see order XIX. of same orders;) otherwise there may be difficulty in dismissing the bill for want of prosecution. See *Kay v. Sanson*, *Grant's Cham. Rep.* 71.

An answer filed after notice of replication has been served is irregular, and will on motion be taken off the files. (*Connell v. Connell*, 1 U. C. Jur. 2-282.)

As to the answer of an illiterate person, see *Wilton v. Clifton*, 2 Hare, 585.

The answer of an infant should be sworn to by the guardian and not by the infant, (*Wrottesley v. Bendish*, 8 P. W. 287; cited in *Smith's Ch. P.* 484-6,) and for that reason cannot be read against the infant. For form of jurat and signature see *Smith's Ch. P.* 488.

An order must be obtained for a married woman to answer separately from her husband. See *Mitford*, 125, 126; *Daniell's Ch. P.* vol. 1, 3rd ed., pp. 189, 849; *Lennaghan v. Smith*, 2 Ph. 537; *Nichols v. Ward*, 2 M. & G. 140. If such an order is applied for by plaintiff, it must be shewn that the wife is in default for want of answer. (*Anon*, *Grant's Cham. Rep.* 9.) And where a solicitor had admitted service of an office copy of a bill for a married woman, and gave a written consent that if no answer was filed the bill might be taken *pro confesso* against her—it was held that this did not dispense with the order for separate answer, before taking the bill *pro confesso* against her. (*Sergeant v. Sharpe*, *Grant's Cham. Rep.* 68.) In *Miller v. Gordon*, 5 *Grant's Ch. Rep.* 134, the court refused to grant an order *pro confesso*, although an order to answer separately had been served upon the married woman, and directed a second office copy of the bill together with an order to be served upon her directing her to answer separately within a time limited after service of that order.

Where husband and wife are made co-defendants the practice is now to serve the husband alone with the office copy of the bill, the service on him being service on the wife. If a joint answer is not put in within the time limited an order *pro confesso* should be taken out against the husband, upon production of which on an *ex parte* application in chambers, an order will be granted that the wife do answer separately within a time limited by the order. This order together with an office copy of the bill should be served personally on the wife, and if she neglects to answer within the time limited an order *pro confesso* may be obtained *ex parte* against her in chambers.

The wife, however, may immediately after service of the bill on the husband, apply in chambers to be allowed to answer separately. Such application must be made by a next friend; it must also be supported by affidavit stating the grounds on which it is sought. (*Gordon v. Weaver*, 5 U. C. L. J. 67.) If the wife does not answer within the time limited by such order, the plaintiff can obtain the usual order *pro confesso* against her. (*Powell v. Prentice*, *Ridgw. P. C.* 258.)

She will always be allowed full time to answer from the date of the order no matter when or how obtained. (*Jackson v. Haworth*, 1 S. & S. 161.)

If the married woman be an infant a guardian *ad litem* must be assigned her before she can answer either jointly or separately. (*Colman v. Northcote*, 2 Hare, 147.)

A married woman would seem in this province to be entitled to answer separately in any of the following cases:

1. Where the suit is in respect of her separate estate, or the husband and she are made co-defendants in right of the wife.
2. Where she is living apart from her husband.
3. Where she disapproves of the answer which he wishes to put in.
4. Where she has an adverse interest to her husband.
5. Where he is out of the jurisdiction.
6. Where she has obtained a protection order under the Married Women Act. (Con. Sta. U. C., ch. 78.)
7. Where the bill has been taken *pro confesso* against the husband.

A married woman can answer separately and without an order where the husband is the plaintiff and makes the wife a defendant. (*Ex parte Strangeways*, 3 Atk. 478; *Brooks v. Brooks*, Pre. Ch. 24; *Ainslie v. Medicott*, 18 Ves. 266; *Higginson v. Wilson*, 11 Jur. 1071.)

Where a husband and wife are sued jointly, a separate answer by the husband without an order for the purpose is irregular. (*Rooney v. Fox*, 1 Jones, 437; and it seems that it is a nullity; *Thompson v. Lockwood*, 8 Ir. Eq. R. 367; *Chambers v. Bull*, 1 Anstr. 269.)

The order for a married woman to answer separately from her husband, must be obtained on motion, but it may be obtained *ex parte*.

Upon motion for decree, the answer of a company which is not sworn, cannot be read as evidence: it can only be read as a matter of pleading. (*Wadeer v. East India Co.*, 9 W. R. 251.)

Rules of practice as to a defendant reading his own answer, or the answer of a co-defendant on motion for a decree. (*Stephens v. Heathcote*, 1 Drew. & Sm. 188.)

On a motion for a decree, neither the plaintiff nor the defendant gave notice of using the answer, nor was it in fact read. Held, that it ought to be entered as read in the decree. (*Bright v. Legerton*, 29 Beav. 69.)

Where a plaintiff on motion for decree gives notice to read against one defendant the answer of a co-defendant, the defendant is entitled to cross-examine on the answer; but where a plaintiff had given notice to read all the answers, and where the sole contest was between co-defendants on a point which could not be determined until after the hearing, upon the plaintiff undertaking not to read the answer in question as an affidavit, leave to cross-examine was refused. (*Dawkins v. Mortan*, 1 Johns. & H. 839; 4 L. T. N. S. 704.)

No notice is necessary to enable a plaintiff, on motion for decree, to read a defendant's answer against defendant. (*Dawkins v. Mortan*, 1 Johns. & H. 839.)

The silence of the answer is not to be construed into an implied admission of the truth of the bill.

The silence of the answer as to any statement of the bill is not to be construed into an implied admission of its truth; and any allegation introduced into an answer for the purpose of preventing such implied admission, is to be considered impertinent. (o)

- (o) Where the answer is silent the statements in the bill may be proved by one

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witness; where, however, the answer distinctly denies any statement made in the bill, the answer must be contradicted by two witnesses, or by one witness corroborated by attendant circumstances. (Story Eq. Jur. 780; Boulton v. Robinson, 4 Grant's Ch. R. 109, 128.)

SEC. 2.—A defendant who has been served with an office copy of a bill of complaint within the jurisdiction of the court, is to answer or demur to any original bill, or bill amended before answer, within one month after the service of the office copy of the bill, or of the notice of the amendment of the bill, as the case may be; and a defendant who has been served with an office copy of a bill of complaint without the jurisdiction, is to answer or demur within the time limited by the order which authorises such service. Whenever a plaintiff amends his bill after answer, a defendant desiring to answer the same is to put in his answer thereto within seven days after notice of the amendment. (p)

Time within which a defendant must answer.

(p) *Order to elect.*—As to election, if a plaintiff proceeds both at law and in equity in respect of the same matter, the defendant, after he has answered the bill, may obtain as of course an order that the plaintiff do elect in which court he will proceed. (Jones v. Earl of Strafford, 3 P. W. 90; Reynolds v. Nelson, 6 Mad. & Geld. 18; Carwick v. Young, 4 Mad. 487; 2 Swan, 248; Royle v. Wynne, 5 Jur. 1002; Cr. & Ph. 252; see however Fennings v. Humphrey, 4 Beav. 1.)

The order being as of course may be obtained on *præcipe* from the registrar or deputy-registrar where the bill is filed. (See order XLIII, sec. 9; and order XLIV, secs. 3 & 5 of the orders of June, 1853.)

The rule applies also where the plaintiff in equity is suing for the same matter in a foreign court. (Pieters v. Thompson, Coop. 294; but see Elliott v. Lord Minto, 6 Mad. 16.)

The plaintiff must, within eight days after the service of the order, file his election, and give notice thereof to the opposite party. If he elects to proceed in equity an injunction to stay the proceedings at law issues without further order, on production of an office copy of the election. See however Braithwaite's Record & Writ Pr. 229, where it is stated that an injunction is unnecessary. The court will even give the defendant liberty to take such steps at law as he may be advised, to recover his costs at law. (Simpson v. Sadd, 3 W. R. 191; but see s. c., 16 C. B. 26; 1 Jur. N. S. 786.) If the plaintiff elects to proceed at law, or does not elect within the time limited, his bill will be dismissed with costs. (Boyd v. Heinzelman, 1 V. & B. 382.) Such a dismissal, however, would not have the effect of a dismissal on the merits, and if the plaintiff failed at law he could file a new bill. (Countess of Plymouth v. Bladon, 2 Vern. 82.) Where, however, the proceeding at law is ancillary, the court

instead of dismissing the bill will merely stay the proceedings in equity, and mould the proceedings at law with a view to its own decree. (*Royle v. Wynne*, Cr. & Ph. 252; 5 Jur. 1002.)

After service of the order to elect, the plaintiff is not at liberty to proceed either at law or in equity until he has elected. (*Carwick v. Young*, 2 Swan. 242.)

To compel the plaintiff to elect it is necessary that the suits should be respecting the same matter, of which the court will either judge itself, or in a doubtful case direct an enquiry by a master. (*Mills v. Fry*, 3 V. & B. 9; *Anon.* 2 Mad. 395; and see also, *Boyd v. Heinzelman*, 1 V. & B. 382; and *Amory v. Brodrick*, Jac. 530.)

The order may be obtained at any stage (after answer) of the suit in equity directly the plaintiff commences an action at law. (*Mills v. Fry*, Coop. 107; and 19 Ves. 278; *Frank v. Bassett*, 2 M. & K. 618; *Orme v. Broughton*, 10 Bing. 538.) If, however, the defendant delays in obtaining the order, he will have to pay the costs incurred after he became aware that he was entitled to the order. (*Ausman v. Montgomery*, 5 Grant, 175.)

The defendant must, however, answer before he is entitled to an order to elect, for until he answers the plaintiff may not know in which court it would be advisable to prosecute his claim. A demurrer will not entitle the defendant to the order. (*G. W. R. Co. v. Desjardin's Canal*, Grant's Cham. 39; *Tillotson v. Gauson*, 1 Vern. 108; *Browne v. Poyntz*, 3 Mad. 24; and see *Fisher v. Mee*, 3 Mer. 45.)

A mortgagee, however, is entitled to proceed in both courts and cannot be compelled to elect. (*Lyster v. Dolland*, 1 Ves. 431; *Schoole & Wife v. Sall*, 1 Sch. & Lef. 176; *Booth v. Booth*, 2 Atk. 343.) This indulgence is, however, only granted to a mortgagee, and a vendor of real estate will not be allowed to sue at law for breach of contract and at the same time to proceed in equity to compel specific performance. (*Barker v. Smark*, 3 Beav. 64; *Gedye v. Duke of Montrose*, 5 W. R. 537; 29 L. T. 122; *Prothero v. Phelps*, 25 L. J. 105; 2 Jur. N. S. 173; 4 W. R. 189.)

A mortgagee may proceed at the same time by a bill in equity for foreclosure, and at law by action of ejectment or action on the covenant. (*Burnell v. Martin*, Dougl. 517; *Cockell v. Bacon*, 16 Bea. 158; *Lockhart v. Hardy*, 9 Bea. 349.) But see *Booth v. Booth*, 2 Atk. 343; and *Palmer v. Hendrie*, 27 Bea. 349, where it was held that if the mortgagee so deal with the estate as to render it impossible for him to restore it on full payment, the court will restrain him from suing at law to recover the mortgage money. See s. c., 28 Bea. 341. When a mortgagee has proceeded at law upon his security, he will not be entitled to his costs in equity, unless the court, under the circumstances, shall see fit to order otherwise. (Order of Court, 6th February, 1858.)

So where the plaintiff in an interpleader suit at law files a bill in equity he cannot be compelled to elect, as he has not that control over the interpleader suit which an order to elect pre-supposes. (*McLean v. Beatty*, Grant's Cham. Rep. 84.)

Upon the same principle upon which the court acts in granting an order to elect, it will, where the plaintiff institutes two suits in equity as to the same matter, sometimes order that one of them be stayed. (*Thwaites v. Foreman*, 10 Jur. 488; *Rigby v. Strangways*, 2 Phil. 175; *Hawkes v. Barrett*, 5 Mad. 17; *Earl of Portarlington v. Damer*, 2 Phil. 262; 16 L. J. 370; 11 Jur. 443; but see, however, *Noble v. Line*, 5 U. C. L. J. 168; *Pott v. Gallini*, 1 S. & S. 206; *McHardy v. Hitchcock*, 12 Jur. 781; *Shepherd v. Towgood*, 6 Mad. 374; *Reid v. Territt*, 1 Coll. 1; *Budgen v. Sage*, 3 M. & C. 683; and *Godfrey v. Maw*, 1 Y. & C. 485.)

See *Leicester v. Leicester*, 10 Sim. 87. See further as to proceedings in law and

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equity at the same time, *Boyd v. Heinzelman*, 1 V. & B. 381; *Hole v. Pearse*, 5 Hare, 408; *Williams v. Roberts*, 8 Hare, 315.

And as to restraining plaintiff where he proceeds at law and in equity at the same time. (*Wedderburn v. Wedderburn*, 2 Bea. 208.)

A party cannot at the same time file a bill for specific performance and bring an action for use and occupation; (*Carwick v. Young*, 4 Mad. 437; *Ambrose v. Nott*, 2 Hare, 649;) or an action for damages for breach of contract; (*Prothero v. Phelps*, 25 L. J. Ch. 105;) or an action of trespass where the plaintiff has obtained an interlocutory order for delivery up of possession. (*Gedye v. Duke of Montrose*, 5 W. R. 537.)

Where a vendor took a bond from the purchaser, and afterwards sued at law thereon and in equity on his lien, it was held that he was bound to elect in which court he would proceed. (*Barker v. Smark*, 3 Bea. 64.)

SEC. 3.—An answer may be filed without oath or signature, by consent, without order.

Answer may be filed without oath or signature, by consent, without order.

SEC. 4.—When, in order to do complete justice, relief ought to be given to the defendant as well as to the plaintiff, or to the defendant alone, or to one of several defendants, the court, if it see fit, may frame its decree so as to attain that object, when the right of the defendant to relief grows out of the same transactions which form the subject matter of the bill; the facts necessary to make out the defendant's right to relief are to be stated in the answer as part of the defendant's case, and he is to pray such relief as he may think himself entitled to. This order is not to be considered as authorising a defendant to state in his answer any distinct or independent matters, not connected with, and growing out of the case made by the bill, as the foundation for relief; and the court, in all such cases, may either grant such relief upon the answer, or it may direct or permit a separate suit to be instituted.

Relief may be granted to a defendant, upon a case made in the answer in certain cases.

SEC. 5.—The court may permit a supplemental answer to be filed at any period of the suit, for the purpose of putting new matter in issue, in furtherance of justice, and upon such terms as may seem proper. (g)

A supplemental answer may be filed in proper cases.

(g) In *Fulton v. Gilmore*, 1 Phil. 522, a defendant was allowed, after the cause

was in the paper for hearing, to file a supplemental answer for the purpose of correcting the error of a date.

In an ordinary case a supplemental answer may be filed to correct a mistake as to a matter of fact. (*Ibid.*) See also *Strange v. Collins*, 2 V. & R. 168; *Edwards v. McLeay*, 2 V. & B. 256; *Wharton v. Wharton*, 2 Atk. 294; *Nail v. Punter*, 4 Sim. 474; *Jackson v. Parish*, 1 Sim. 505; *White v. Sayer*, 4 Sim. 566; *French v. Mylos*, 4 Mad. 404; *Wells v. Wood*, 10 Ves. 401; *Greenwood v. Atkinson*, 4 Sim. 54; *Patterson v. Slaughter*, Ambl. 292; *Curling v. Lord Townsend*, 19 Ves. 627; *Fulton v. Gilmore*, 1 Ph. 522. After cause had been set down for examination of witnesses, the counsel for the defendant, having discovered that certain grounds of defence had not been raised by the answer which might have been, leave was given to put in supplemental answer on paying costs of application. (*Cherry v. Morton*, Grant's Cham. Rep. 25; *Nail v. Punter*, 4 Sim. 574.)

A defendant cannot amend his answer; if he is desirous of correcting, adding to, or explaining the same after it has been filed, he must apply for liberty to file a supplemental answer; (*Smith's Ch. Pr.*, p. 494—*Wells v. Wood*, *supra*; *Dolder v. The Bank of England*, 10 Ves. 284; *Edwards v. McLeay*, 2 V. & B. 256; *Jennings v. Merton College*, 8 Ves. 79; *Phelps v. Prothero*, 2 DeG. & Sm. 274; *there cited*;) and where at the time of swearing his answer he was ignorant of a particular fact; see *Tidswell v. Bowyer*, 7 Sim. 64; *Frankland v. Overend*, 9 Sim. 365; but if the amendment is prejudicial to the plaintiffs the court always grants the leave with great difficulty. See *Phelps v. Prothero*, *supra*; *Swallow v. Day*, 2 Coll. 133.

Where a bill had been filed against trustee and executors residing in Lower Canada to compel them to account, and they answered submitting to account, but before evidence was taken, discovered that there was an important difference as to their responsibility under the laws of Upper Canada and Lower Canada respectively, which they did not know when they had filed their answer, they were permitted, on paying costs of the application and of the amendment, to file a supplemental answer stating the fact of foreign domicile and the law of Lower Canada, according to which alone they had always acted, though the effect of such permission might be to enable them to set up want of jurisdiction as a defence. (*Terrance v. Crooks*, 1 Grant Er. & Ap. 230; 2 U. C. Jur. App. III.)

Leave to file a supplemental answer is to be applied for by motion. The notice of motion is to set forth the proposed answer, and state the grounds upon which the indulgence is asked. It is to be served upon the solicitors of all parties, unless dispensed with; and it must be supported by such evidence as shall satisfy the court of the propriety of permitting such supplemental answer to be filed, under all the circumstances, having reference to the subject matter of the answer, and to the stage of the cause in which the application is made. (r)

(r) See *Haslar v. Hollis*, 2 Beav. 236. A defendant should state specifically what he wishes to put on record, so that the court may judge if his application be reason-

able; (*Smith's Ch. Pr.*, p. 494.)

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able; (Smith v. Hartley, 5 Beav. 482;) and should also shew a sufficient reason why the new matter was not inserted in the original answer. (Scott v. Carter, 1 Y. & J. 452.)

PRO-CONFESSO—PRELIMINARY PROCEEDINGS.

XIII. (s) Where any defendant (not appearing to be an infant, or a person of weak or unsound mind, unable of himself to defend the suit) *has been personally served within the jurisdiction of the court* with an office copy of a bill of complaint, and has neglected to answer thereto within one month from the time of such service, the plaintiff, after the expiration of one month, and within two months from the date of such service, may apply to the registrar for an order to take the bill *pro confesso* against such defendant, and, no answer having been filed, the registrar is to draw up such order, upon *præcipe*, on being satisfied by affidavit that an office copy of the bill of complaint *was served personally within the jurisdiction*; (t) and after the expiration of such two months the plaintiff may apply to the court *ex parte* for an order to take the bill *pro confesso*, and the court being satisfied by affidavit that an office copy of the bill was served personally within the jurisdiction, and that no answer has been filed, may, if it think fit, order the same accordingly. (u)

Order to take the bill *pro confesso* upon *personal service* within the jurisdiction.

(s) By the orders promulgated on the 10th day of January, 1863, it is provided that in cases for redemption or foreclosure of mortgages or for sale, (Order IV.,) "When the time for answering in either of the above classes of cases has elapsed, on production to the registrar of the court, of the affidavit of the service of the bill, and upon *præcipe*, the plaintiff is to be entitled to such a decree as would, under the present practice, be made by the court, upon a hearing of a cause *pro confesso*, under an order obtained for that purpose."

No order to take a bill *pro confesso* in either of the above classes of cases is now required. The necessity for such an order being dispensed with in every case whether the bill is served within or without the jurisdiction, and whether served personally or by substitutional service.

Of course the practice remains as it was before these orders were promulgated, in all cases where the bill is filed for any purpose other than "for redemption or foreclosure of mortgages or for sale."

ORDER PRO CONFESSO; WITHOUT JURISDICTION.

[ORDER XIII., SEC. II. AND III.]

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court, *ex parte*, for an order to take the bill *pro confesso* against such defendant; and the court, being satisfied by affidavit that an office copy of the bill of complaint was served personally, and that no answer has been filed for such defendant, may, if it think fit, order the same accordingly. (v)

(v) To support an application for an order under this section it is necessary to prove the identity of the person served as being the defendant; to shew that the order limiting the time to answer was shewn to him; and the proof in these particulars is very strictly scrutinised by the court; an admission by the person served that he is the defendant is insufficient. In effect the requisites for such application are, the affidavit of the service of the bill, which must be so expressed as to be in conformity with the notice to answer on the office copy and with the order authorising service—an affidavit of the service of the order and of having shewn the original to the defendant, and also clearly establishing the identity of the person served with the defendant, and the registrar's certificate of the state of the cause.

SEC. 3.—Where an office copy of a bill of complaint has been duly served, *but such service has not been personal*, and the defendant has neglected to answer or demur thereto within the time limited in that behalf, the plaintiff may cause such defendant to be served personally, or by his solicitor, if he have one, with a notice of motion to be made on some day, not less than three weeks after the date of such service, that the bill may be taken *pro confesso* against such defendant; and thereupon, unless such defendant has in the meantime put in his answer to the same, the court, if it think fit, may order the bill to be taken *pro confesso*, either immediately, or at such time and upon such terms, and subject to such conditions, as the court, under the circumstances of the case, may think proper. (w)

Order to take the bill *pro confesso* upon motion, where service has not been personal.

(w) Where a solicitor accepts service of an office copy of the bill of complaint and gives a written undertaking to answer the same, or in case of default that an order *pro confesso* may be drawn up, the usual two days' notice of motion must be given, and may be served upon the solicitor; (Ross v. Hayes, 6 Grant's Chan. Rep. 277, following the practice laid down in Shaw v. Liddell, 4 Grant's Chan. Rep. 352;) but where an office copy of the bill had been served on the solicitor of a defendant who

ORDER PRO CONFESSEO ; PUBLICATION.

[ORDER XIII., SEC. IV.]

undertook to put in an answer, or in default that the plaintiff might take the bill *pro confesso* without further notice being given, an order *pro confesso* was granted *ex parte* accordingly. (Peterborough v. Conger, Grant's Cham. Rep. 18.)

SEC. 4.—Where an office copy of a bill of complaint has been duly served, *but such service has not been personal*, and the defendant has neglected to answer or demur thereto within the time limited in that behalf, then in case the office copy of the bill has been served upon such defendant out of the jurisdiction, or the plaintiff has been unable with due diligence to serve him personally with such notice of motion as is provided by the next preceding section of this order, in either case the court, upon the *ex parte* application of the plaintiff, may direct a notice of motion in the form or to the effect set forth in schedule G. to these orders appended, to be published in such manner as the court may think fit; and upon the hearing of such motion the court, being satisfied of the due publication of the notice, and that no answer has been filed, may order the bill to be taken *pro confesso*, either immediately, or at such time, and upon such conditions, as the court, under the circumstances of the case, may think proper. (x)

Order to take the bill *pro confesso* upon publication of notice, when the defendant has been served with an office copy of the bill out of the jurisdiction, or cannot be found to be served with notice of motion.

(x) The following is the schedule G referred to in the above section :

SCHEDULE G.

NOTICE IN CASE OF AN ABSENT DEFENDANT.

IN CHANCERY.

A. B. Plaintiff.
and
C. D. Defendant.

To the defendant C. D.,

Take notice, that a motion will be made to the court, on the _____ day of _____, (the time fixed by the order authorising publication,) that the bill in this cause may be taken as confessed against you; and such order having been made, the court may grant to the plaintiff such relief as he may be entitled to on his own shewing; and you will not receive any further notice of the future proceedings in the cause.

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SEC. 5. a defendan order is a unable of no validity

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GUARDIAN AD LITEM; APPOINTMENT OF.

[ORDER XIII., SEC. V.]

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The omission of the name of the defendant against whom the bill is sought to be taken *pro confesso*, under this section, in the advertisement, is a fatal defect. (*Jones v. Brandon*, 8 Jur. N. S. 1146.) The papers in which the advertisement is inserted must be produced to the court, before the order will be granted. (*Goodfellow v. Hambly*, Grant's Cham. Rep. 62.) See notes as to service of bill by publication—*supra*. (Order IX., secs. 7 and 8.)

SEC. 5.—An order to take a bill *pro confesso* against a defendant who at the time of the making of such order is an infant, or person of weak or unsound mind, unable of himself to defend the suit, is irregular and of no validity.

An order to take the bill *pro confesso* against an infant defendant, void.

In case it shall appear to the court that any defendant upon whom an office copy of a bill has been duly served is an infant, or a person of weak or unsound mind, not so found by inquisition, unable of himself to defend the suit, the court, upon the application of the plaintiff, at any time after bill filed, may order that one of the solicitors of the court be assigned guardian of such defendant by whom he may answer the bill and defend the suit.

One of the solicitors of the court may be appointed guardian in such case.

Notice of the application must be served upon, or left at the dwelling-house of the person with whom, or under whose care such defendant may be residing at the time of the motion, at least one week before the hearing of the application; and where such defendant is an infant, not residing with or under the care of his father or guardian, in that case notice of the application must also be served upon, or left at the dwelling house of the father or guardian/unless the court at the time of hearing such application think fit to dispense with such service. (y)

Notice of the motion, how served.

(y) Infants as well as adults may be made defendants to suits in equity, and when so made it is not necessary that any other person should be joined with them in the bill, nor is it necessary that they should be described as infants in the bill, unless any question in the suit turns upon the fact of their infancy. The plaintiff, how-

ever, upon a guardian being appointed in the manner provided by these orders, should thereafter describe the infant in the title of the cause as "Jane Smith, an infant under the age of 21 years, by John Styles, her guardian."

Infants are not permitted, on account of their supposed want of capacity, to defend themselves; and therefore, where a defendant to a suit is an infant, the plaintiff must proceed to obtain the appointment of a guardian to such infant defendant, who is styled "the guardian of the infant," or "the guardian *ad litem*," to distinguish him from the ordinary guardian. The court appoints this person, who must be a proper person, and not a mere volunteer. (*Foster v. Cantley*, 10 Hare, App. xxiv.) Usually one of the solicitors of the court is appointed, who puts in a defence for the infant and generally acts on his behalf in the conduct and management of the case. He must put in a proper defence, and is responsible for the propriety and conduct thereof. An infant's answer is expressed to be made by his guardian, and is generally confined to a mere submission of his rights and interests in the matters in question in the cause to the care and protection of the court.

The court will not make a decree by consent where infants are concerned, without an inquiry whether it will be for their benefit.

See Order of 8th Nov., 1856, which is as follows:

"When infants or persons of unsound mind, not so found by inquisition, are made parties to suits after decree, or are served with a notice of motion under Order XV. of the General Orders of June, 1853, guardians *ad litem* are to be appointed for them in like manner as they are now appointed, at any time after bill filed; and this order is to take effect from the date hereof, as to all suits, as well those now pending as those hereafter to be instituted."

Before the court will appoint a guardian *ad litem* under this section should it not be satisfied that no relative will undertake the defence? (*Moore v. Platel*, 7 Bea. 583; *Foster v. Cantley*, 10 Hare, App. xxiv.; *Anon.* 9 Hare, App. xxvii.) There is no doubt but that in all cases where an infant is entitled to appear in any matter or suit, he must appear by a duly constituted guardian *ad litem*. (*In re Duke of Cleveland's Harte Estates*, 1 Drew & Sm. 46; 29 L. J. Ch. 530; 2 L. T. N. S. 78; 8 W. R. 336; *In re Ward* 2 Giff. 122; 6 Jur. N. S. 441; 2 L. T. N. S. 82; *In re Barrington*, 27 Bea. 272.) Where an infant was a married woman, it was held that a guardian must be appointed. (*Colman v. Northcote*, 2 Hare, 147; *Jersey v. Villiers*, and the other cases there cited.) A guardian *ad litem* will not be appointed to a person merely because he is in weak health. (*Willyams v. Hodge*, 1 M. & G. 516.) Where a defendant's competency was disputed an enquiry was directed. (*Lee v. Ryder*, 6 Mad. 294.) Where the lunatic has been so found by inquisition the committee will be appointed guardian as of course. (*Daniell's Chancery Practice*, 3rd edit. 145.) But if the committee have an adverse interest, another guardian will be appointed. (*Worth v. MacKenzie*, 3 M. & G. 863.)

If the father of the infant be dead it should be shewn on affidavit whether he died intestate or otherwise, and whether any guardian has been appointed.

And as to a person of unsound mind "not so found by inquisition," the affidavit must shew this to be the fact. (*Crawford v. Birdsall*, Grant's Chamber Rep. 70.) Where service cannot be effected on the infant as required by this section, the court may order the bill to be amended by striking out the name of the infant, saving just exceptions. (*Blackmore v. Howett*, 30 L. T. 101.)

As to infant defendants residing out of the jurisdiction. (*Chaffers v. Laker*, 5 DeG. M. & G. 482; 3 W. R. 201, 280; 1 Jur. N. S. 32; *Lingren v. Lingren*, 7 Bea. 66; *Anderson v. Stather*, 10 Jur. 388.)

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GUARDIAN AD LITEM; APPOINTMENT OF.

[ORDER XIII., ENO. V.]

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The court nominates the solicitor. (Thomas v. Thomas, 7 Bea. 47; Sheppard v. Harris, 15 L. J. Ch. 104; Bidulph v. Camoys, 9 Bea. 548; Moore v. Platel, 7 Bea. 583; and see Biddulph v. Dayrell, 15 L. J. Ch. 320; where the wife's solicitor was appointed guardian *ad litem* of her husband, a lunatic defendant, on proof that the husband had no adverse interest; see also, Anon, 9 Hare, xxvii., where it was said the court would prefer some adult and competent person, having no adverse interest, rather than a solicitor, or other stranger.)

The guardian must be resident within the jurisdiction. (Anon, 18 Jur. 770.) And the court will not appoint the plaintiff, or a person under disability. (Smith's Ch. Pr. 484.) But there is no objection to appointing a defendant who has not a conflicting interest. (*Ibid.*) The guardian appointed in an original suit may act in a supplemental or revived suit without further order. (*Ibid.*)

Where the notice was served at the house of the mother of the infant and her second husband, the father being proved to be dead, such service is sufficient within the terms of this section. (Hitch v. Wells, 8 Bea. 576; Baker v. Holmes, 1 Dick. 18; Thompson v. Jones, 8 Ves. 141; Lane v. Hardwicke, 5 Bea. 222.)

Semble, that where the infant defendants are concealed in the mother's house to avoid service, the putting an office copy of the bill under the door of the mother's dwelling house would be a good service. (Clark v. Waters, Smith's Ch. Pra. 378.) When a defendant is of unsound mind and confined in an asylum, the court will, on proof that on service of the bill on her she was made aware of the general nature of the claim against her, appoint her a guardian under this section. (Elliston v. Sheldrake, 2 L. T. N. S. 48.)

Where the guardian *ad litem* refuses to act, and the court accepts his refusal, it will appoint another solicitor as guardian without notice. (Millen v. Wilmott, Registrar's (Grant's) note, 6 Oct. 1855.) And where the guardian refuses to put in an answer, the plaintiff should move on notice for him to answer within a time to be limited by the court (usually 14 days) or in default, that he be removed and a new guardian assigned. (Pinch v. Crookshank, 14th September, 1858, Registrar's Notes, per V. C. E.) So if the guardian dies the court will appoint a new one *ex parte*, on proof of death of the former guardian, and that the disability continues. (Matthewson v. Sullivan, per Spragge, V. C., Sept. 1862.) But in England where the guardian dies a special application for the appointment of a new one becomes necessary. (Needham v. Smith, 6 Bea. 130; and cases there cited.)

The answer is signed and sworn to by the guardian and not by the infant, and for that reason cannot be read against the infant. (Wrottesley v. Bendish, 3 P. W. 237; s. c., Smith's Ch. Pr. 484-6;) where it is recommended that when the guardian is a co-defendant he should sign twice.

A guardian *ad litem* being merely appointed to protect the interests of the infant in the suit, his authority ceases with the suit, and an application by such a guardian for an order to invest money realized in a suit and standing in court to the credit of the infant after the suit was ended, was refused. (Dix v. Jarman, Grant's Cham. Rep. 38.)

Where a mother is plaintiff and the infants are defendants and are of a proper age to be consulted, the notice of the application for the appointment of guardian should be also served on the infants. (Galbraith v. Galbraith, 5 U. C. L. J. 42.)

By Order II., of 6th June, 1853, it is provided that an infant may apply for the appointment of a guardian; the order is as follows: "A party desirous of appointing a guardian for him to defend a suit, may go before a judge or master with the proposed guardian, and the judge or master may appoint such guardian if he shall think fit so to do.

But he must be satisfied by affidavit that such proposed guardian is a fit person, and has no interest adverse to that of the person of whom he is to be the guardian in the matter in question; and if the affidavit is not sufficient for this purpose, he may examine the proposed guardian, or the person making the affidavit, *vivâ voce*, or require further evidence to be adduced, until he is satisfied of the propriety of the appointment."

All applications for the appointment of guardians must be made in Chambers under Order XXXIV. of the Orders of June, 1853, and a deputy-master has power to appoint a guardian *ad litem* for infants only, under Order XLIV. of Orders of June, 1853, sec. 4. And as to guardians *ad litem* appointed after decree, see Orders of 8th November, 1856, *supra*; the mode of proceeding under which is identical with the mode of proceeding provided by this Order XIII. sec. 5.

Where an infant applies, after majority to put in a defence which was not raised by his guardian *ad litem*, he must shew that the defence is a proper one. (*Mair v. Kerr*, 2 Grant, 223.)

It is irregular also to appoint the professional agent of the plaintiff's solicitor guardian *ad litem* to an infant defendant. (*Fletcher v. Bosworth*, 5 Grant, 458.)

An affidavit was allowed to be filed after the day named for the application to be heard, shewing that the defendants were infants. (*Freeland v. Jones*, 2 Grant, 581.)

Committees of the persons and estates of lunatics, idiots and persons of unsound mind, and guardians, excepting guardians *ad litem*, are to be appointed in the manner provided by Order XXXVIII. of June, 1853.

Order to take the bill *pro confesso* against an absconding or an absent defendant.

SEC. 6.—Where the plaintiff has proceeded under either section 7 or 8 of Order IX., and the defendant has neglected to answer or demur to the bill within the time limited in that behalf, in either case the plaintiff may apply to the court, *ex parte*, for an order to take the bill *pro confesso* against such defendant; and the court being satisfied of the due publication of the order and notice in that behalf prescribed, may direct the bill to be taken *pro confesso* against such defendant, if it think fit, either immediately, or at such time, and upon such terms, and subject to such conditions, as the court, under the circumstances of the case, may think proper. (2)

(2) The several newspapers in which the advertisement has been inserted must be produced to the judge before the order will be granted. (*Goodfellow v. Hamby*, Grant's Cham. Rep. 62.) In moving to take a bill *pro confesso* against a defendant under this section, it is necessary to shew by affidavit that the defendant continues to reside out of, or to conceal himself within the jurisdiction, so that he cannot be found to be served with the notice of motion. (*Gilmour v. Matthews*, 4 Grant's Cham. Rep. 376.) And where four months had elapsed from the date of

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ORDER PRO CONFESSO; SERVICE, AMENDMENT AFTER.

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[ORDER XIII., SEC. VII. AND VIII.]

the order to advertise, before granting an order *pro confesso*, under this section, an affidavit was required, shewing that the defendant had not returned within the jurisdiction, and that the plaintiff was still ignorant of his whereabouts, and unable to serve him with notice. (McCarthy v. Wessels, Grant's Cham. Rep. 5.)

SEC. 7.—An order to take a bill *pro confesso* against a defendant does not require to be served; and all further proceedings in the cause may be *ex parte*, as to such defendant, unless the court order otherwise. (a)

Order to take the bill *pro confesso* need not be served.

(a) See Cryne v. Doyle, Grant. Cham. Rep. 1. cited *supra*.

Where, after a bill has been ordered to be taken *pro confesso*, but before any decree is drawn up, the defendant intervenes and is a party to proceedings taken between the plaintiff and defendant, that is not such a case as is contemplated by this section, where all further proceedings in the cause may be taken *ex parte*. (Strachan v. Murney, 6 Grant's Cham. Rep. 284.)

Although the bill is *pro confesso*, the defendant may appear in the master's office, and cause mesne incumbrancers to be made parties, although there is no reference thereunto in the decree. (Cameron v. Lynes, Grant's Cham. Rep. 42.)

As to appearing on the hearing *pro confesso*, see Order XIV., sec. 2.

Query, whether when accounts are to be taken against a defendant, he ought not to be served with the decree directing the enquiry as to taking the accounts and making incumbrancers parties, or at any rate with the warrant to proceed thereon in the master's office. (Golden v. Newton, Johns. 720; 8 W.R. 256; and see King v. Bryant, 3 M. & C. 131.) And where an enquiry as to title is directed by a decree, on a hearing *pro confesso* whether the defendant ought not to be served with a copy of the abstract of title, and notice to object thereto within fourteen days.

As to the practice on taking bills *pro confesso*, before the Orders of June, 1853, see Buchanan v. Tiffany, 1 Grant, 98; Hawkins v. Jarvis, 1 Grant, 257, and Perrin v. Davis, 3 Grant, 161.

After a bill is taken *pro confesso* against a defendant, the court will not hear any affidavits to contradict the bill as confessed; the order *pro confesso* must be first set aside. (Manley v. Williams, 5 U. C. L. J. 163.)

SEC. 8.—A plaintiff may move *ex parte* for leave to amend the bill, without prejudice to an order to take the bill *pro confesso*; and where the court is satisfied that the rights of the defendant will not be prejudiced by such an order, it may direct the same accordingly. (b)

Bill may be amended without prejudice to an order to take the bill *pro confesso* in certain cases.

(b) The plaintiff should take care that the order to amend is *without prejudice* to the order *pro confesso*, otherwise the taking out of an order to amend will be a

PRO CONFESSO; HEARING; DECREE.

[ORDER XIV., SEC. I.]

waiver of the order *pro confesso*, and the defendant will have to be served with the amended bill, and will then be at liberty to answer or demur. (Weightman v. Powell, 2 DeG. & S. 570; Herchmer v. Benson, 1 Grant's Ch. R. 92.) As to amendment being a waiver of the order, see Thrasher v. Connolly, 1 Grant's Chan. R. 422.

PRO CONFESSO,—HEARING,—DECREE.

Cause may be set down to be heard after the expiration of three weeks from the date of the order to take the bill *pro confesso*.

XIV.—Where a bill has been ordered to be taken *pro confesso* against all parties defendant, the cause may be set down to be heard at any time after the expiration of three weeks from the date of such order, unless the court thinks fit to appoint a special day for the hearing thereof. (c)

(c) This order has been somewhat varied in its application by the Orders of court promulgated on the 10th of January, 1863. By Order IV. of the Orders of the last mentioned date, it is provided as follows:—

“Decrees for redemption or foreclosure of mortgages, or for sale:

“IV. When the time for answering in either of the above classes of cases has elapsed, on production to the registrar of the court of the affidavit of the service of the bill, and upon præcipe, the plaintiff is to be entitled to such a decree as would, under present practice, be made by the court upon a hearing of a cause *pro confesso*, under an order obtained for that purpose; and on every such bill is to be endorsed the following notice:—‘Your answer is to be filed at the office of the registrar at Osgoode Hall, in the city of Toronto (or when the bill is filed in an outer county, at the office of the deputy-registrar at ———.) You are to answer or demur within four weeks from the service hereof (or when the defendant is served out of the jurisdiction, within the time limited by the order authorising the service.) If you fail to answer or demur within the time above limited, you are to be subject to have a decree or order made against you, forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.’

“Note.—This bill is filed by Messrs. A. B. & C. D., of the city of Toronto, in the county of York, solicitors for the above named plaintiff, (and when the party who files the bill is agent, add, agents of Messrs. E. F. and G. H., of ———, solicitors for the above plaintiff.) And upon bills for foreclosure or sale is to be added to such notice the following: “And take notice that the plaintiff claims that there is now due by you for principal money and interest, the sum of £ ———, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the decree, your interest in the property may be foreclosed (or sold) unless before the time allowed you as by this notice for answering, you file in the office above named a memorandum in writing, signed by yourself or your solicitor, to the following effect: ‘I dispute the amount claimed by the plaintiff in the cause—in which case you will be notified of the time fixed for settling the amount due by you at least four days before the time to be so fixed. This order is not to affect any suit now pending.’”

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PRO CONFESSO; HEARING; DECREE.

[ORDER XIV., SEC. I, II., AND III.]

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by this order will be after the time for answering has expired, to produce to the registrar at Toronto an affidavit of the service of the bill, and a præcipe for a decree in pursuance of the prayer thereof. It is presumed that a certificate from a deputy registrar (if the bill be filed in an outer county) must also be produced, shewing that the defendant has not filed an answer. The decree cannot be obtained until all the defendants are served and the application must be suspended until all services are effected, and the time for all the defendants to answer has expired.

Some difficulty may also arise until the practice has been ventilated in working out the above order. It will be observed that the decree is to be obtained in Toronto—the only evidence upon which it is to be obtained, is the affidavit of service of the bill, and the præcipe; it seems clear, however, that a certificate of the non-filing of an answer should be also filed. But with regard to the memorandum to be endorsed upon the office copy bill when served the further difficulty will arise: the defendant is to be at liberty by himself or his solicitor to file a memorandum in writing in the office where the bill is filed to the following effect: "I dispute the amount claimed by the plaintiff in the cause." How is the registrar at Toronto to know whether such a memorandum has been filed in the office of a deputy registrar without a certificate as to the fact? It is therefore presumed that such a certificate must be obtained when application is made for the decree.

By Order 29th June, 1861, it is provided that "where a bill has been ordered to be taken *pro confesso*, the cause may thereupon be set down to be heard; but the day for which the same is so set down is to be not less than ten days from the setting down thereof, unless the court think fit to appoint a special day for the hearing thereof."

But see *Cryne v. Doyle*, Grant's Cham. Rep. 1, cited *supra*.

SEC. 2.—A defendant against whom an order to take a bill *pro confesso* has been made, is at liberty to appear at the hearing of the cause; and if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the bill. (d)

(d) A defendant appearing at the hearing and waiving all objection to an order *pro confesso*, may shew that the bill is open to demurrer for want of equity. (*Greig v. Green*, 6 Grant's Cham. Rep. 240; 3 U. C. L. J. 218.) Where the defendant does not appear, and the plaintiff appeared to have no equity, the bill was dismissed. (*Spaidall v. Jervis*, 2 Dick. 632.) It is too late at the hearing to object to a bill that it is multifarious, as that is an objection which should be taken by demurrer. (*Ward v. Cooke*, 5 Madd. 122; *Schram v. Armstrong*, 1 U. C. Jur., part 2, 327.) But it is not too late to object at the hearing for want of parties, as the court is bound to take notice of any defect that will render the suit imperfect, and a decree therein inconclusive, the defect however, must be apparent on the pleadings. (*Ibid*.)

SEC. 3.—Upon the hearing of a cause, in which a bill has been ordered to be taken *pro confesso*, such a decree is to be made as the court may think just; and the decree so made is to be absolute in the following cases, viz.:

A decree founded on a bill taken *pro confesso*, is to be absolute in certain cases.

PRO CONFESSO; HEARING; DECREE.

[ORDER XIV., SEC. III., IV., AND V.]

1st. When an office copy of the bill has been served personally.

2nd. When notice of a motion to take the bill *pro confesso* has been served under the third section of the next preceding order.

3rd. When the defendant has appeared at the hearing, and waived all objection to the order to take the bill *pro confesso*.

A decree founded on a bill taken *pro confesso* to be passed and entered.

SEC. 4.—A decree founded on a bill taken *pro confesso* is to be passed and entered as other decrees. (e)

(e) The passing and entry of the decree are essentially requisite to the perfect completion of it. (Drummond v. Anderson, 3 Grant, 150.)

The decree or order is said to be passed when the registrar has inserted his initials in the last page as an authority to the clerk to enter it in the registrar's book. (Seton on Decrees, 2nd ed., p. 584.) All proceedings under a decree or order before it is entered are irregular and voidable. (Tolson v. Jervis, 8 Bea. 384.) When passed and entered it can only be varied on a re-hearing. (Seton on Decrees, p. 588.)

SEC. 5.—After a decree founded on a bill taken *pro confesso* has been passed and entered, if the decree be not absolute under section three of this order, an office copy thereof may be served on the defendant against whom the order to take the bill *pro confesso* has been made, or his solicitor, together with a notice to the effect that if such defendant desires permission to answer the plaintiff's bill and set aside the decree, application for that purpose must be made to the court within the time specified in such notice, or that such defendant will be absolutely excluded from making such application. If such notice as aforesaid is to be served within the jurisdiction of the court, the time therein specified for such application to be made by the defendant, is to be three weeks after service of such notice; but if such notice is

Where a decree founded on a bill taken *pro confesso*, is not absolute under section 3, it may be made absolute upon motion, with notice.

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PRO CONFESSO; HEARING; DECREE.

[ORDER XIV., SEC. V. AND VI.]

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to be served out of the jurisdiction, the time is to be specially appointed by the court upon the *ex parte* application of the plaintiff. (f)

(f) The court cannot dispense with the service provided for by this section, see *Vaughan v. Rogers*, 11 Bea. 165; and as to what is a sufficient notice, see *Trilly v. Keefe*, 16 Bea. 83; 16 Jur. 442.

SEC. 5a.—When a decree is not absolute under section three of this order, the court may order the same to be made absolute, on the motion of the plaintiff:

1. After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction.
2. After the expiration of the time limited by the notice provided by section five of this order.
3. After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof; (g) and such order may be made either on the first hearing of such motion, or on the expiration of any further time which the court may allow to the defendant for presenting a petition for leave to answer the bill.

(g) See *James v. Rice*, 5 DeG. M. & G. 461; 2 W. R. 658.

SEC. 6.—Where the decree is not absolute under section three of this order, and has not been made absolute under section five, and a defendant has a case upon the merits not appearing in the bill, he may apply to the court by petition, stating such case, and submitting

PRO CONFESSO; HEARING; DECREE.

[ORDER XIV., SEC. VI. AND VII.]

A defendant against whom a decree has been made founded upon a bill taken *pro confesso*, may apply to put in an answer under certain circumstances.

to such terms with respect to costs and otherwise as the court may think reasonable, for leave to answer the bill; and the court being satisfied that such case is proper to be submitted to the judgment of the court, may, if it think fit, and upon such terms as may seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the bill; and if permission be given to such defendant to answer the bill, leave may be given to file a separate replication to such answer, and issue may be joined, and witnesses examined, and such proceedings had as if the decree had not been made, and no proceedings against such defendant had been had in the cause. (h)

(h) Upon a fair case being made out the court will act under this section, upon the defendant paying the costs of the suit and of the application. (Inglis v. Campbell, 2 W. R. 896.) Where a defendant had been allowed to answer after a *pro confesso* decree to account in a foreclosure suit, on condition of paying the costs of the application and putting in the answer within two weeks, upon no answer being put in for several weeks, motion to discharge the order with costs was granted. (Williams v. Atkinson, Grant's Chamber Reports, 84.)

SEC. 7.—A defendant waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the court may direct, may have the case re-heard upon the merits stated in the bill; the petition for re-hearing being signed by counsel as other petitions for re-hearing. (i)

Cause may be re-heard after a decree founded upon a bill taken *pro confesso*.

(i) As to petitions of re-hearing generally, see order thereon, (Order IX., sec. 17,) and Order I., of the Orders promulgated on the 10th day of January, 1863; this latter Order is as follows:—

RE-HEARINGS.

I. From and after the first day of April next all re-hearings of causes are to be within six months after the decree or decretal order shall have been passed and entered; and applications in the nature of re-hearings to discharge or vary orders made in court, not being decretal orders, are to be within four months from the passing and entering of the same; or within such further time as the court or any judge thereof may allow upon special grounds therefor, shown to the satisfaction of the court or judge.

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By Order promulgated on the 28th April, 1862, it is provided as follows:—

“RE-HEARING OF CAUSES.

There are to be four re-hearing terms in each year, commencing respectively as follows:

- 1.—The second Thursday in March.
- 2.—The first Thursday in June.
- 3.—The second Thursday in September.
- 4.—The first Thursday in December.

All re-hearings of cases are to be in re-hearing term only.

Applications in the nature of re-hearings to discharge or vary orders made in court, are to be made in re-hearing terms only, except with the leave of the judge pronouncing the order sought to be discharged or varied.”

And by order of the 9th May, 1862, as to the setting down of causes for re-hearing it is provided that:

“Causes are to be set down for re-hearing not less than ten days before the commencement of the re-hearing term, for which they are so set down, and notice thereof is to be served upon all proper parties not less than seven days before such re-hearing term.”

As to re-hearing generally, see *Pennell v. Miller*, 23 Bea. 172; *Head v. Godlee*, *Reynolds v. Godlee*, *Johns*, 536; 6 Jur. N. S. 495; *Hughes v. Jones*, 26 Bea. 24; *Maybery v. Brooking*, 7 DeG. M. & G. 673; 25 L. J. Ch. 87; 4 W. R. 155.

It must be observed that by Order XLIII. of the Orders of June, 1853, sec. 7, “the amount to be deposited with the registrar of the court on any petition of re-hearing is ten pounds.”

The petition should set out all the objections to the decree, for on the argument the petitioner cannot ask the decree to be varied in any particular not objected to by the petition, and on a second re-hearing he is confined to the parts objected to by the first petition. (*McMaster v. Campton*, 5 Grant, Ch. R. 549; *Malone v. Geraghty*, 3 Dr. & War. 262; 5 Ir. Eq. R. 549.)

The petition need not state the reasons why the party presenting it is dissatisfied with the original decree or order; it usually states, however, in a general manner, that he is aggrieved by it, that the cause may be re-heard; that the decree may be reversed or varied; and if varied, the points which are objected to. The certificate should be signed by counsel; “that they conceive that the cause is proper to be re-heard.” (*Monkhouse v. The Corporation of Bedford*, 17 Ves. 380; *Cunyngham v. Cunyngham*, Amb. 91; *Atty.-Gen. v. Brooke*, 18 Ves. 325; *East India Co. v. Boddam*, 13 Ves. 423.) See, however, *McMaster v. Campton*, and *Malone v. Geraghty*, cited *supra*.

The petition should state the facts of the case as they appear in the pleadings, and it may also set forth the grounds insisted upon in the answer against making the decree, (*Wood v. Griffith*, 19 Ves. 550,) but it must not state any matters which do not appear in the pleadings or the statement of which is not warranted by them, s. c.; and see *Nevinson v. Stables*, 4 Russ. 210.

Any subsequent proceeding (*ex gr.* an order of court made since the decree for the purpose of carrying it into effect) should be stated. (*Wood v. Griffith*, *supra*; *Turner v. Turner*, 2 De. G. M. & G. 28.)

RE-HEARING.

[ORDER XIV., SEC. VII.]

If the petition be irregular, or if it be improperly framed, or make a different case from that on which the decree was made, or introduce representations which were not made in court it will be ordered to be taken off the files, with costs, the deposit to go in part of costs, (*Wood v. Griffith, supra.*) but without prejudice to a new petition being filed in a more regular form. (*Ibid.*)

Though a cause has been heard and re-heard before one of the judges of the court, a re-hearing before the full court is *as of course*. (*Cook v. Walsh*, 1 Grant Ch. R. 209; and see the numerous cases there cited.) Only one re-hearing before the full court is permitted *as of course*. (*Ibid.*) See also s. c., 2 Grant Ch. R. 625.

A re-hearing will only be permitted on grounds which existed at the time when the decree was pronounced, (*Bowyer v. Bright*, 13 Price, 316,) where the object was not to correct the decree, but to remedy a grievance consequent upon it, resulting from circumstances *ex post facto*, and not making part of the case as it originally stood.

So, on a re-hearing, circumstances which have occurred since the order or decree cannot be considered. (*Horne v. Barton*, 26 L. J. Ch. 225.) Where, since the order was made, the law on which the order was founded has been altered, the proper course is to present a petition of re-hearing to come on with the cause. (*Fleming v. Fleming*, 9 W. R. 757.)

A cause will not be re-heard for costs alone. (*Blackwood v. Gregg, Hayes & J.* 310.) The foundation of this rule is clearly stated by Lord *Hardwicke* in *Owen v. Griffith*, 1 Ves. Sr. 249; s. c., Amb. 520; see also *Widman v. Kent*, 1 Bro. C. C. 140; 2 Dick. 594; *Angell v. Davis*, 4 M. & C. 360 & 363; *Whalley v. Lord Suffield*, 12 Beav. 402; *Jenour v. Jenour*, 10 Ves. 562; *Taylor v. Popham*, 15 Ves. 72; *Chappel v. Purday*, 2 Phil. 227.

No evidence can, as a general rule, be adduced at a re-hearing which a party was not prepared with and entitled to produce at the hearing. Therefore an order which had been obtained as of course to prove *viva voce* at a re-hearing a document which a party had not obtained an order to prove at the hearing, was discharged for irregularity; but leave will generally be given on a special application under such circumstances, to prove a document at the re-hearing; (*Lovell v. Hicks*, 2 Y. & C. 472; s. c., 6 L. J. N. S. Exc. Eq. 85;) see also *Higgins v. Mills*, 5 Russ. 287; where such an order was granted; and see also *Wyld v. Ward*, 2 Y. & J. 381; where new evidence was admitted on a re-hearing and the petition allowed to be amended to state discovery of such new evidence. And again, in *Williams v. Goodchild*, 2 Russ. 91, where on a re-hearing evidence taken in the cause was read, which was not read at the original hearing. This rule was also followed in *Glover v. Daubeney*, 9 Jur. N. S. 90, where the court observed that documentary evidence not used on the original hearing might be used on the re-hearing, but it would not allow the use of further affidavits made by persons who had made affidavits before the original hearing. See also *Needham v. Smith*, 2 Vern. 463; *Dashwood v. Lord Bulkeley*, 10 Ves. 287; *Buckmaster v. Harrop*, 13 Ves. 458; *Huddleston v. Briscoe*, 11 Ves. 587; *White v. Fussell*, 1 V. & B. 153; *Goodyer v. Lake*, cited Amb. 90.

The plaintiff may withdraw from the evidence any portion of the answer which he may have read at the original hearing. (*Allfrey v. Allfrey*, 1 M. & G. 87; *Ogle v. Morgan*, 1 DeG. M. & G. 359.)

The court will also allow the production at a re-hearing of exhibits which were not in evidence at the original hearing, (*Walker v. Symonds*, 1 Mer. 37,) and an order to prove *viva voce* such exhibits can be obtained. (*Williamson v. Hutton*, 9 Price, 187; *Williams v. Goodchild*, 2 Russ. 92; *Wyld v. Ward*, 2 Y. & J. 381.) See fur-

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ther Cotton v. Corby, Grant's Cham. 10, where it was held that a party is entitled to an order on *præcipe* to prove at a re-hearing depositions which had not been used at the original hearing saving all just exceptions. And on a re-hearing, depositions taken on the part of a *defendant* may be read though not read at original hearing. (Cunyngham v. Cunyngham, Amb. 89; s. c., Dick. 145.) *Query*, whether additional evidence is not permitted in some instances, subject to costs. (White v. Fussell, 1 V. & B. 153.) But in no case has the court permitted *new* evidence to be given at a re-hearing, as to any matter which was not in issue upon the original hearing. (Martin v. Pycroft, 2 De G. M. & G. 785.)

Bill against husband and wife taken *pro confesso*; husband died; re-heard on wife's petition. (Took v. Clark, Dick. 350.)

If a decree against an infant does not reserve a day to shew cause, the infant on coming of age, if he wishes to move against the decree must have the cause re-heard so as to have such a reservation inserted.

The court will not re-hear a cause in which the decree is not drawn up but remains in minutes. (Commissioners of Charitable Donations v. Hunter, 1 Dr. & War. 544; Baxter v. Wilson, 2 Atk. 152.)

At a re-hearing the court may give the plaintiff liberty to amend by adding parties in the same manner as upon an original hearing, and will order the re-hearing to stand over for the purpose. (Daniell's Ch. Pr., 3rd Ed. 1132.) The costs are in the discretion of the court.

A decree or order made by consent of counsel cannot be the subject of re-hearing. (Stewart v. Forbes, 12 Jur. 968; Sturgeon v. Hooker, 2 Phil. 289.) With reference to what orders are deemed to be upon consent, see Davis v. Chanter, 10 Jur. 975; and C. P. Cooper's Reports, vol. 1, page 285. But a party dissatisfied with a decree will not prejudice his right to have the cause re-heard by consenting to an order consequential upon the decree. (Wood v. Griffith, 1 Mer. 35; Turner v. Turner, 2 DeG. M. & G. 28.) A re-hearing does not suspend the proceedings under a decree. (Buck v. Fawcett, 3 P. Wms. 242.) If proceedings are required to be stayed a special order should be obtained. (Gwynn v. Lethbridge, 14 Ves. 585; Waldo v. Caley, 16 Ves. 206; Willan v. Willan, 16 Ves. 213.)

But no general rule can be laid down upon this subject. (Walburn v. Ingilby, 1 M. & K. 61; Stainton v. Chadwick, 3 M. & G. 343.) And it is the duty of the court to exercise its discretion according to the circumstances of each particular case. (Mayor and Corporation of Gloucester v. Wood, 3 Hare, 154; 1 Phil. 493.)

A motion to stay proceedings (on a reference to take an account) pending a re-hearing was refused, but the V. C. (*'pragge*) intimated that no report need be signed, the defendant using due diligence to bring the case to a re-hearing. (Campbell v. Campbell, Grant's Cham. Rep. 30.)

When the petition has been presented the order for setting down the cause for re-hearing must be obtained from the registrar, and the cause must be set down in pursuance of the orders before set forth, and not less than ten days before the commencement of the re-hearing terms which are in such orders provided, as causes can only be re-heard in re-hearing terms.

Care must be taken that notice is served on all proper parties not less than seven days before the re-hearing term. The order provides for all *proper* parties to be served, if the bill be *pro confesso* against any parties it is presumed that they need not be served.

Upon a decree founded on a bill taken *pro confesso*, the court may order a receiver, or sequestration or payment of moneys.

SEC. 8.—In pronouncing the decree the court, either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, may order a receiver of the real and personal estate of the defendant against whom the bill has been ordered to be taken *pro confesso* to be appointed, with the usual directions, or direct a sequestration of such real and personal estate to be issued; and may, if it appears to be just, direct payment to be made out of such real and personal estate of such sum or sums of money as at the hearing or any subsequent step in the cause the plaintiff may seem to be entitled to; provided that, unless the decree be absolute, such payment is not to be directed without security being given by the plaintiff for restitution, if the court afterward think fit to order a restitution to be made. (k)

(k) As to the security, see *Lett v. Randall*, 7 Jur. 1075; and for the form of decree, see *Torr v. Torr*, Johns, 660.

SEC. 9.—The rights and liabilities of any plaintiff or defendant under a decree made upon a bill taken *pro confesso* extend to the representatives of any deceased plaintiff or defendant at the time when the decree was pronounced; and with reference to the altered state of parties and any new interests acquired, the court may, upon motion, served in such manner, and supported by such evidence as under the circumstances of the case the court deems sufficient, permit any party, or the representative of any party, to adopt such proceedings as the nature and circumstances of the case may require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree and the rights of the parties duly ascertained and determined.

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MOTION FOR A DECREE TO ADMINISTER THE ESTATE OF A DECEASED PERSON, WITHOUT BILL FILED.

Creditor, &c., of any deceased person may move for an order for the administration of his estate.

XV. (1) Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, (m) or the next of kin, or some one of the next of kin, or the heir, or a devisee interested under a will of any deceased person, may apply to the court upon motion, without bill filed or any other preliminary proceeding, for an order for the administration of the estate real and personal of such deceased person.

(1) English act 15 & 16 Vic., ch. 86, sec. 45, 46, and 47. This order applies only to simple cases; when therefore the defendant in an administration summons sets up a release, the validity of which was disputed, the court dismissed the order as irregular. (*Acaster v. Anderson*, 19 Beav. 161; s. c., 24 L. J. Ch. 437; *vide* also *Rump v. Greenhill*, 20 Beav. 512; s. c., 24 L. J. Ch. 90; 1 Jur. N. S. 123, where it was held that a decretal order on such an application was no answer to a suit embracing matters which could not be included therein. But where an order for administration has been made, and accounts taken, it would seem that the court will decide on the rights of the parties, unless questions of great difficulty are involved. (*West v. Laing*, 3 Drew. 331; s. c., 4 W. R. 1.) See too, *Re Rigg*, *Wadham v. Rigg*, 10 W. R. 365. See as to application of this order, *Ogden v. Lowry*, 25 L. J. Ch. 196; s. c., 4 W. R. 156; *Pigott v. Young*, 7 W. R. 235.

Before instituting proceedings under this order, the practitioner should satisfy himself that the case is one that can be properly dealt with, by an order made under the authority hereby conferred. The application must be supported by a proper affidavit. Notice of motion for an order to administer had been served on the widow of an intestate, as administratrix, but there being no evidence to shew that letters of administration had been granted to her, the motion was refused. (*In re Marshall*, Grant's Cham. Rep. 29.) And after motion granted under this order, no step being taken thereon for four years, an application for a direction to the registrar to draw up the order was refused. (*In re Forrister*, Grant's Cham. Rep. 29.)

(m) Whether the assignee or mortgagee of a residuary legatee can obtain such an order seems to be doubtful. (*Whittington v. Edwards*, 3 DeG. & J. 243; 7 W. R. 72.)

The court has power under this section to make an order for the administration of the effects bequeathed by the will of a married woman made in pursuance of a power. (*Sewell v. Ashley*, or *Ashley v. Sewell*, 3 DeG. & M. & G. 933; s. c., 17 Jur. 269; 22 L. J. Ch. 659.)

The notice of motion in such case is to be in the form set forth in schedule H. hereunder written, and must be served upon the executor or administrator.

Notice of motion to be in the form set forth in schedule H., and served upon the executor or administrator.

executor or administrator, as the case may be, of such deceased person, at least fourteen days before the day fixed for hearing the application. (n)

(n) Schedule H. to these orders is as follows :

SCHEDULE H.

NOTICE OF MOTION FOR THE ADMINISTRATION OF THE ESTATE OF A DECEASED PERSON.

IN CHANCERY.

In the matter of the estate of John Thomas, late of the township of _____
in the county of _____, deceased.

Joseph Wilson
against
William Cochran.

To William Cochran, executor of John Thomas, deceased.

Take notice, that Joseph Wilson, of the city of Toronto, in the county of York, Esquire, (or other proper description of the party,) who claims to be a creditor upon the estate of the above-named John Thomas, will apply to one of the judges of the Court of Chancery, at Osgoode Hall, in the city of Toronto, on the _____ day of _____, at the hour of noon, for an order for the administration of the estate real and personal of the said John Thomas, by the Court of Chancery.

NOTE.—If you, the above-named William Cochran, do not attend, either in person or by your solicitor, at the time and place above-mentioned, such order will be made in your absence as the judge may think just and expedient.

A. D.,

Of the city of Toronto, Solicitor for the above-named Joseph Wilson.

Court may order
the administration
of the estate.

Such order to
have the force
and effect of a
decree.

Upon proof by affidavit of the due service of such notice of motion, or on the appearance in person, or by his solicitor or counsel, of such executor or administrator, and upon proof by affidavit of such other matter, if any, as the court may require; the court, if it think fit so to do, may make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require; (o) and the order so made shall have the force and effect of a decree to the like effect, made on the hearing of a cause between the same parties.

(o) In general only the usual administration order will be made. (Partington v. Reynolds, 4 Drew. 253; Blakeley v. Blakeley, 1 Jur. N. S. 368; Re Fryer, 26 L. J.

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Ch. 898; 8 K. & J. 817; cf. *Jones v. Morrall*, 2 Sim. N. S. 241.) But the court has power, on reasonable grounds, to direct further accounts or enquiries in such an order. (*Mutter v. Hudson*, 2 Jur. N. S. 34; *Delevante v. Child*, 6 Jur. N. S. 118,) and in a recent case—*Brooker v. Brooker*, Re *Brooker's Estate*, 8 Sm. & G. 475; 26 L. J. Ch. 411; s. c., 8 Jur. N. S. 381; 28 L. T. 854; *Stuart, V. C.*, made an order for an injunction and receiver, as against the administratrix of a deceased intestate after the common decretal order had been made, a case of wilful default against the administratrix having come out in the course of the proceeding taken under the order. See, too, as to wilful default, *Tickner v. Smith*, 8 Sm. & G. 42. This case has, however, not been generally followed, for in *Partington v. Reynolds*, 4 Drew 258; 27 L. J. Ch. 505; 4 Jur. N. S. 200; 6 W. R. 615; 81 L. T. 7, *Kindersley, V. C.*, held that the court had no power to charge the defendant as for wilful default, as by so doing it would be directing accounts on a footing inconsistent with the decretal order itself. (*Delevante v. Child*, *supra*; *Hodson v. Ball*, 1 Phil. 177; *Nelson v. Booth*, 3 DeG. & J. 119; 27 L. J. Ch. 782; 68 W. R. 845; 5 Jur. N. S. 28.) And see *Harrison v. McGlashan*, 7 Grant's Chan. Rep. 581; where the order for the administration having been granted upon the application of a person beneficially interested in the estate, the court refused to insert a direction in the decree to enquire as to wilful neglect and default. *In re Wiltshire's Estate*, 8 W. R. 183; 6 Jur. N. S. 190; it was held by *Stuart, V. C.*, that an executor cannot on an order under this section be charged upon an admission of assets.

Where the representative of an executrix in effect refuses to account, a person interested is always justified in filing a bill, and will be allowed the costs of such bill, particularly if questions of construction arise. (*Smith v. Spilsbury*, 1 Drew. & Sm. 151; 3 W. R. 596.)

A plaintiff in an administration suit commenced under this order, may move to stay proceedings in a suit commenced by bill, if it can be shewn that the order will effect all that can be directed by a decree made upon a bill filed. (*Ritchie v. Humbersone*, 22 L. J. Ch. 1096; but see *Rump v. Greenhill*, *supra*; cf., *Penny v. Francis*, 30 L. J. Ch. 185; *Furze v. Hennett*, 2 DeG. & J. 125; *Gwyer v. Peterson*, 26 Bea. 83.) After an order made the court will stay an action at law against the executor as after a decree obtained on a bill. (*Gardner v. Garrett*, 20 Bea. 469.)

Where several orders are applied for, see *Harris v. Gandy*; *Wills v. Gandy*, 1 DeG. F. & J. 18, as to priority; and *Penny v. Francis*; *Woodhatch v. Francis*, 7 Jur. N. S. 248; 30 L. J. Ch. 185; 9 W. R. 8; as to the principles which govern the court as to directing the conduct thereof, the court will not facilitate strangers to the estate (as creditors) having the conduct of the matter. (*Ibid.*) Where an executor moves to restrain different creditors who have commenced different actions against him, from proceeding therewith, a separate notice of motion for injunction must be served upon each creditor so suing. One notice including all the creditors would be insufficient. (*Moseley v. Moseley*, 9 W. R. 581.)

Where, however, a creditor had before decree obtained a judgment against the executrix, and had also obtained a garnishee order *nisi* against a debtor to the estate, the court after a decree to account refused to stay proceedings on the garnishee order. (*Fowler v. Roberts*, 7 U. C. L. J. 163.)

Where, in a creditors suit to administer the estate of an intestate, to whose estate administration *ad litem* had been taken out, the bill alleged that there were no personal assets, and the parties interested in the real estate had allowed bill to be taken *pro confesso*, and did not appear at the hearing, the court made the usual decree without requiring a general administration to be first obtained. (*Dey v. Dey*, 2 Grant's Chan. R. 149.)

See further, as to the jurisdiction of the court under this section. (*Mutter v. Hudson*, 2 Jur. N. S. 34; *Whittington v. Edwards*, 3 DeG. & J. 243; 7 W. R. 72; 82 L. T. 187.)

In a suit commenced under this order, it would seem that the defendant's husband having become a lunatic, the court on an *ex parte* motion supported by an affidavit of fitness, would appoint a guardian *ad litem*, to represent his estate. (*Osbaldiston v. Crowther*, Re *Osbaldiston*, 1 Sm. & G. App. xii.; s. c., 1 W. R. 255; see, too, Order XIII., sec. 5, and notes; *supra*.)

Parties out of the jurisdiction must be served with notice of the decretal order. (*Strong v. Moore*, 22 L. J. Ch. 917; s. c., 1 W. R. 509.)

Parties cannot be served out of the jurisdiction under Order IX., sec. 5. (*Lester v. Bond*, 1 Drew. & Sm. 394; 9 W. R. 407; 7 Jur. N. S. 538.)

Evidence may be taken in proceedings under this order, though not strictly a suit, they having been introduced in lieu of bill; therefore an order was granted for a commission to take evidence in Scotland to prove that a party applying under this order was next of kin. (*Farrell v. Cruikshank*, Grant's Cham. R. 12.)

Carriage of the order may be committed to any party interested, at the discretion of the court.

The court is to give any special directions touching the carriage or execution of any such order as, in its discretion, it may deem expedient; and in case of applications for any such order by two or more persons, or classes of persons, the court may grant the same to such one or more of the claimants, or of the classes of the claimants, as it may think fit; and the carriage of the order may be subsequently given to such party interested, and upon such terms as the court may direct.

SEC. 2.—An order for the administration of the estate of a deceased person may be obtained by his executor or administrator, as the case may be, and all the provisions of the first section of this order are to extend to applications by an executor or administrator under the present section. (*p*)

(*p*) Where an executor or administrator applies for an order under this section, the account will be directed to be taken of what he has received, or which, but for his wilful default, he might have received. (*Ledgerwood v. Ledgerwood*, 7 Grant's Cham. Rep. 584.) But where a decree is made under sec. 1. of this order, at the instance of a person beneficially interested, a direction to enquire as to wilful neglect and default will not be inserted in it. (*Harrison v. McGlashan*, 7 Grant's Cham. R. 581.)

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MOTION FOR DECREE; AFTER ANSWER.
[ORDER XVI., SEC. 1.]

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SEC. 3.—The costs attending the administration of the estate of a deceased person under the preceding sections of this order, are to be borne by such estate, unless the court shall direct otherwise. (q)

(q) Where a *simple contract* creditor obtained an order to administer an intestate's estate, and after having had notice that the assets were insufficient to pay a specialty creditor, and the costs of the administration, he persisted in prosecuting his suit; it was held that the assets must be applied first in paying the costs of the administratrix, then in paying the plaintiff's costs down to the notice, and that the residue must be paid to the specialty creditor. (Sullivan v. Bevan, 20 Beav. 399.)

In administration suits, no costs ought to be given out of the estate, except for those proceedings which are in their origin reasonably directed for the benefit of the estate, or which have in their result conduced to that benefit. (Bartlett v. Wood, 30 L. J. Ch. 614; 9 W. R. 817; 4 L. T. N. S. 692.)

And in an administration suit of an intestate's estate where the whole of the real and personal estate was insufficient to pay the claims made by creditors, held, that the heir-at-law and administratrix were entitled to their costs as between solicitor and client, and also to all costs, charges, and expenses, properly incurred by them in respect of the intestate's estate. (Tardrew v. Howell, Parry v. Howell, 2 Giff. 530; 7 Jur. N. S. 937; 30 L. J. Ch. 191; 9 W. R. 296; 3 L. T. N. S. 661.) See also on the question of costs, (Barnwell v. Iremonger, 1 D. & Sm. 255; Maddison v. Chapman, 1 Johns & H. 470; Watson v. Fitzpatrick, 11 Ir. Ch. R. 215;) where a party appeals from a decree in an administration suit, and is successful, he will be allowed the costs of the appeal out of the estate. (Menzies v. Ridley, 2 Grant's Chan. R. 544.) An executor or administrator has no right to move for a decree merely to obtain indemnity by passing his accounts under the direction of the court, there should be some question or dispute to submit to the court, otherwise he will not receive his costs. (White v. Cummins, 3 Grant's Chan. R. 602.) Where a bill is filed against executors, as such, who have renounced probate, it will be dismissed against them with costs. (Stinson v. Stinson, 2 Grant's Chan. R. 508.)

MOTION FOR A DECREE AFTER TIME FOR ANSWERING
HAS EXPIRED.

XVI. The plaintiff in any suit, at any time after the period allowed to the defendant for answering has expired, but before replication, (r) may move the court for such decree or decretal order as he may think himself entitled to; (s) and the plaintiff and defendant respectively may file affidavits in support of and in opposition to such motion, (t) and may use the same at the hearing thereof; and when such motion is made after an answer filed in the cause, the answer, for the purpose of the motion, is to be treated as an affidavit.

The plaintiff is at liberty to move for a decree in all cases after the time for answering has expired.

(r) This order corresponds with English act 15 and 16 Vic., c. 86, s. 15.

On motion for decree replication need not be filed either before or after notice. (*Duffield v. Sturges*, 9 Hare, App. lx-xvii; s. c., 22 L. J. Ch. 288; *Blake v. Cox*, 1 W. R. 124.)

Motions for decree may be set down at any time, before the court enters on the paper. (*Clarke v. Hall*, 7 Grant's Chan. R. 339.)

(e) A plaintiff moving for a decree according to the prayer of the bill, may have the same relief which he could have had at the hearing of the cause in the ordinary way. (*Norton v. Steinkopf*, Kay 45, App. x.; s. c., 28 L. J. Ch., 85; 22 L. T. 169.) But this practice was disapproved of by *Stuart*, V. C., in *Aylett v. Pontin*, 28th June, 1858.

A notice of motion for a decree is not to be treated as an ordinary motion in the course of a cause which the plaintiff is at liberty to abandon on the usual terms, and the plaintiff having given a notice of motion for a decree, cannot, without leave, abandon that mode of hearing the cause, and proceed to a hearing in the ordinary way. (*McLaughlin v. Whiteside*, 7 Grant's Chan. R. 515.) In this case the plaintiff having countermanded the notice, filed replication and set the cause down for examination; the replication was ordered to be taken off the files and the cause struck out of the examination list with costs. (s. c., Grant's Chan. R. 56.)

(f) This practice has, in effect, been repealed by the orders of 29th June, 1861, which have limited the application of this order to suits in which no evidence is necessary, or where the evidence is essentially documentary. The order is as follows:

"MOTION FOR DECREE.

Where a party has given notice of motion for decree, he is to set the cause down to be heard on such motion, not less than ten days before the day for which such notice is given, unless he shall have obtained an order allowing a less time for such purpose.

Motions for decree are to be allowed only in three classes of cases, namely:—

First.—When there is no evidence.

Second.—Where the evidence consists only of documents, and such affidavits as are necessary to prove their execution or identity, without the necessity of any cross-examination.

Third.—Where infants are concerned, and evidence is necessary only so far as they are concerned for the purpose of proving facts which are not disputed; but this order is not to apply to cases in which, but for this order, the court would grant leave to serve short notice of motion for decree in order to prevent irreparable injury."

The practice of hearing by way of motion for decree, although limited in its general application to the cases above mentioned, may be resorted to "in cases where the court would grant leave to serve short notice of motion for decree in order to prevent irreparable injury;" it therefore becomes necessary to refer to the old practice, and to cite a few authorities thereon.

In the first place to enable a party to move for a decree in a case which does not come within those mentioned in the order of the 29th June, 1861, it is clear that he must make a case in order to justify such an application, and that he must obtain leave to serve a notice of motion for decree. The affidavits to be used on such a motion must be filed with the registrar before the notice is served, see Order XL., sec. 2, and a list of such affidavits should be set forth in the notice of motion.

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MOTION FOR DECREE; AFTER ANSWER.

[ORDER XVI., SEC. I.]

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And the court on granting the leave would no doubt limit the time within which the motion may be heard, and within which the defendant must file his affidavits in answer, and the plaintiff his affidavits in reply, and that such terms and conditions should be embodied in an order made on the *ex parte* application of the plaintiff for leave to serve his notice of motion, and a copy of such order should be served with the notice of motion.

The court would also, without doubt, embody terms as to cross-examination of parties making affidavits either in support of the plaintiff's or the defendant's case. For a plaintiff or defendant making affidavits in support of or against motion for decree may be cross-examined thereon. (*Williams v. Williams*, 17 Bea. 156; s. c., 10 Hare, App. xlv.; 17 Jur. 434; 1 W. R. 318.) So a defendant may be cross-examined upon his answer and will not be allowed to read it on a motion for decree, unless the plaintiff has had an opportunity of cross-examining him thereon. (*Wightman v. Wheelton*, 28 Bea. 397; s. c., 3 Jur. N. S., 124; 5 W. R. 337; 28 L. T. 316; *Rehden v. Wesley*, 26 Bea. 432; 33 L. T. 25.) The practice hereon has been determined in *Stephens v. Heathcote*, 1 Dr. & Sm. 138; 8 W. R. 336; 29 L. J. Ch. 529; 26 L. T. N. S. 112; 6 Jur. N. S. 312; as follows:

1. That a plaintiff *may* read a defendant's answer against the defendant without notice. (*Dawkins v. Mortan*, 1 J. & H. 389.)
2. That a defendant may *not* read one defendant's answer against his co-defendant *without notice*.
3. That a defendant may *not* read his own answer against the plaintiff *without notice*.
4. That if the plaintiff reads one part of a defendant's answer against that defendant, such defendant, *notwithstanding that no notice has been given*, is at liberty to read the rest of his answer as against the plaintiff. A defendant can read his co-defendant's answer against the plaintiff, *but only on notice*. (*Lord v. Colvin*, 3 Drew. 222; *Rushout v. Turner*, cited in 8 W. R. 337.)

Where the plaintiff can read the defendant's answer without notice, he may always enter it as read in the decree. (*Bright v. Legerton*, 29 Beav. 69; 29 L. J. Ch. 856.) As to the effect of giving notice of an intention to read the defendant's answer. (*Wright v. Edwards*, 7 W. R. 198.)

Notice of the motion is to be served upon the defendant or defendants at least three weeks before the day fixed for the application. (u)

Notice of the motion to be served three weeks before the day of hearing.

(u) English Consolidated Order, No. XXXIII., rule 4.

Within ten days from the service of the notice the defendant must file his affidavits in answer. (v)

Affidavits in answer, ten days after notice.

(v) English Consolidated Order, No. XXXIII., rule 6.

Within six days after the expiration of such ten days

Affidavits in reply, within six days after.

the plaintiff is to file his affidavits in reply ; and except so far as these affidavits are in reply, they are not to be regarded by the court, unless upon the hearing of the motion the court shall give the defendant leave to answer them ; and in that case the costs of such affidavits, and of the further affidavits consequent upon them, are to be paid by the plaintiff, unless the court order otherwise. (*w*)

(*w*) English Consolidated Order, No. XXXIII., rule 7.

No further evidence except by special leave.

No further evidence, on either side, is to be used upon the hearing of such motion, without the leave of the court. (*x*)

(*x*) English Consolidated Order, No. XXXIII., rule 8.

The court in its discretion may pronounce a decree,

or direct further enquiries, &c.

Upon hearing the application, the court, in its discretion, may either grant or refuse the motion, or may give such directions for the examination of either parties or witnesses, or for the making of further enquiries, as the circumstances of the case may require, and upon such terms as to costs as it may think right. (*y*)

(*y*) English Act, 15 & 16 Vic., ch. 86, sec. 16.

The court may dismiss the bill. (*Robinson v. Lowater*, 2 Eq. Rep., 1070.) But should the court think the case made by the bill inconsistent with the relief prayed, or not proved by the evidence, it may simply refuse the motion with costs, and leave the cause to come on for a hearing. (*Thomas v. Bernard*, 7 W. R. 86 ; s. c., 5 Jur. N. S. 31 ; 32 L. T. 208 ; and see *Warde v. Dickson*, 5 Jur. N. S. 698.) In exercising their discretion under this section, the court will of course be guided by the ordinary rules of equity. (*Adams v. Smyth*, 22 L. J., Ch. 968 ; s. c., 1. W. R. 475.) The motion is equivalent to the hearing of the cause, and the court may grant the parties all the relief they could have at the hearing. (*Norton v. Steinkopf*, 1 Kay 46.) And it is sufficient to move for a decree "according to the prayer of the bill." (*Ibid.*) For reference as to a motion for decree see *Daniell's Ch. Pr.*, 3rd Ed., 661 ; *Smith's Ch. Pr.* 649 ; *Ayckburn*, 129 ; *Braithwaite*, 120 ; *Morgan's Chancery Orders*, 514.

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DECREE; BEFORE ANSWER.—REPLICATION.
[ORDERS XVII. AND XVIII., SEC. I.]

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MOTION FOR A DECREE BEFORE THE TIME FOR ANSWERING HAS EXPIRED.

XVII. When it can be made to appear to the court that it will be conducive to the ends of justice to permit such notice of motion to be served before the time for answering the bill has expired, the plaintiff may apply to the court, *ex parte*, for that purpose, at any time after the bill has been filed, and the court, if it thinks fit, may order the same accordingly; and when such permission is granted, the court is to give such directions, as to the service of the notice of motion and the filing of the affidavits, as it may deem expedient.

The plaintiff may move for a decree in any case before the time for answering has expired, by leave of the court.

Upon the hearing of the motion for a decree or decretal order, the court, in its discretion, may either grant or refuse the application, or may give such directions for the examination of either parties or witnesses, or for the making of further enquiries, or with respect to the further prosecution of the suit, as the circumstances of the case may require, and upon such terms as to costs as it may think right. (z)

The court in its discretion may make a decree,

or may direct further enquiries, &c.,

or may order the suit to proceed.

(z) A plaintiff is not entitled, as of course, to a decree before the time for answering the bill has expired; some special ground must be shewn to induce the court to grant it. (Davidson v. McKillop, 4 Grant's Chan. Rep., 146.) This order applies to foreclosure as well as to other suits.

JOINING ISSUE. REPLICATION.

XVIII. No subpoena to rejoin is to be issued. One replication only is to be filed in the cause, unless the court shall order otherwise; (a) it is to be in the form set forth in schedule J. hereunder written, or as near thereto as circumstances admit and require; and upon the filing of the replication the cause is to be deemed to be completely at issue.

No subpoena to rejoin.

Form of replication in schedule J.

cause to be at issue on filing the replication.

(a) Where the plaintiff cannot obtain a decree on motion, or cannot hear the cause on

REPLICATION.

[ORDER XVIII., SEC. I.]

the order *pro confesso*, or on bill and answer, he must reply to the answer, which course is analogous to traversing it; and the defendant is thereupon compelled to prove the matters contained in it. The replication may be filed at any time after all the defendants have put in their answers, or when the order to take the bill *pro confesso* as to some, (the others having answered), has been obtained.

A plaintiff can have a cause heard in a different manner against different defendants, that is to say, he may have it heard on the order *pro confesso* against one, on bill and answer against another, and may reply as to the others; the form of replication expresses the manner in which the suit is to be heard against each defendant, as will be seen by referring to the form, *infra*. The replication, when engrossed, is filed with the registrar, or deputy registrar, (if the bill is filed in an outer county,) and notice of the filing must be served on the same day on the solicitors of all the defendants who have answered.

A replication when filed, must, like all other pleadings and proceedings, be endorsed in conformity with the 2nd and 3rd sections of Order XLIII. of the Orders of June, 1868.

The 2nd and 3rd sections of Order XLIII. are as follows :

"Sec. 2.—Upon every writ sued out, and upon every information, bill, demurrer, answer, or other pleading or proceeding, there shall be endorsed the name or firm and place of business of the solicitor, or solicitors by whom such writ has been sued out, or such pleading or other proceeding has been filed; and when such solicitors are agents only, then there shall be further endorsed thereon the name or firm, and place of business of the principal solicitor or solicitors.

Sec. 3.—Every party suing or defending *in person* is to cause to be endorsed or written upon every writ which he sues out, and upon every information, bill, demurrer, answer, or other pleading or proceeding, his name and place of residence, and also (when his place of residence is more than three miles from the office where such pleading or other proceeding is filed) another proper place, to be called his address for service, not more than three miles from the said office, where writs, notices, orders, warrants, and other documents, proceedings and written communications, may be left for him."

It is important to observe that this order requires every pleading or proceeding to be endorsed as therein mentioned. Every affidavit filed and notice of motion served, ought to be endorsed. Very little attention has been given by practitioners generally to the requirements of this order in regard to the endorsement of proceedings in the cause, other than the bill, demurrer, or answer.

It frequently happens, that from the state of the cause a replication can be filed against one defendant before it can be filed against another; but a replication can be filed *once* only in each cause.

Where a plaintiff had set the cause down and served notice of examination without having filed a replication, he was allowed to file one *nunc pro tunc* on the payment of costs. (*Beckett v. Rees*, 1 Grant, 434.)

After the plaintiff has filed his replication, it is irregular to obtain an order of course to amend. (*Hitchcock v. Jaques*, 9 Beav. 192.)

So after publication has passed the plaintiff, if he wishes to amend, must first withdraw his replication. (*Anon*, 1 Atk., 51; *Turner v. Williams*, 2 Fowl. 46.)

It is irregular to file a replication to the answer of a deceased defendant, (*Daw-*

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REPLICATION.
[ORDER XVIII., SEC. I.]

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son v. —, 4 L. J. Ch. 143,) and by the same case a replication irregularly filed is a proceeding in the cause until it is taken of the files.

A plaintiff has been permitted to withdraw his replication and set his cause down for hearing on bill and answer. (Rogers v. Goore, 17 Ves. 130.)

As a general rule, however, as we have before seen after a replication has been filed it cannot be withdrawn and the bill amended further than by adding parties, unless a special application for leave is made to do so. In the case of such an application in addition to the affidavit usually required on a motion for leave to amend a further affidavit is necessary shewing that the matter of the proposed amendment is material and could not, with reasonable diligence, have been sooner introduced into the bill. (Daniell's Ch. Pr., 3rd ed. 668.)

The application to file a second replication is not wanted of course, nor it seems, except in cases of necessity. (Stinton v. Taylor, Hare, 608.) But it has been held that when some of the defendants answer after replication has been filed, the plaintiff should move for leave to file a further replication. (Rogers v. Hooper, 2 Drew. 97; s. c., 23 L. J. Ch. 449.)

When, after a notice of motion by one of two defendants to dismiss the bill, for want of prosecution, a replication was filed to the answer of that defendant, the court refused the motion, but only on the terms of the plaintiff undertaking to dismiss the bill against the other defendants, and paying the costs. (Heanley v. Abraham, 5 Hare, 214.)

In a case where replication had been filed by the mistake of the plaintiff's solicitor, the court enlarged the time for publication of the evidence. (Wragg v. Wragg, 11 Jur. 701.)

A replication to the answer of a deceased defendant is irregular. The suit should first be revived against his representatives. (Deeks v. Stanhope, 2 W. R. 651.)

The following is the schedule J., referred to in this order :

SCHEDULE J.
FORM OF REPLICATION.
IN CHANCERY.

A. B..... Plaintiff.
and
C. D., E. F., and G. H..... Defendants.

The plaintiff in this cause joins issue with the defendants E. D., (all the defendants who have answered,) and will hear the cause upon bill and answer against the defendant E. F., (all defendants against whom the cause is to be heard upon bill and answer,) and on the order to take the bill *pro confesso* against the defendant G. H. (as the case may be.)

Applications for leave to withdraw replication cannot be made after witnesses have been examined. (Gascoyne v. Chandler, 3 Swan. 418; Bousfield v. Mould, 1 DeG. & Sm. 347.)

A supplemental answer may by consent be filed after the replication has been filed, without withdrawing it. (Parsons v. Hardy, 21 L. J. Ch. 400.)

Where no order to amend has been obtained, replication to be filed, or cause to be set down on bill and answer, within one month after answer.

SEC. 2.—When the plaintiff has not obtained an order to amend his bill, he is either to file his replication, or set down the cause to be heard on bill and answer, within one month after the filing of the last answer. (b)

(b) "Filing of the last answer." As to the meaning of these words, see *Arnold v. Arnold*, 1 Ph. 805; *Dalton v. Hayter*, 7 Bea. 586; *Forman v. Gray*, 9 Bea. 196, 200; *Sprye v. Reynell*, 10 Bea. 351; the last answer means "the last answer required to be put in previous to replication;" (*Arnold v. Arnold*; *supra*.) i.e., the last of several answers filed by several defendants. (*Forman v. Gray*, 9 Bea. 200; *Duncombe v. Lewis*, 10 Bea. 273; *Stinton v. Taylor*, 4 Hare, 608.) But in *Dalton v. Hayter*, *supra*, the words were held to mean "the last answer of one of several defendants," but see *Sprye v. Reynell*, *supra*.

When an order to amend has been obtained after answer, the replication is to be filed, or the cause set down on bill and answer, within the following periods.

SEC. 3.—When the plaintiff has obtained an order to amend his bill after answer, he is either to file his replication, or set down the cause to be heard on bill and answer, within the times following, viz. :

When no answer has been filed, and notice of an application for further time to answer, has been served, within seven days after the service of the notice of amendment, then within fourteen days after service of the notice of amendment.

- (1) When the plaintiff amends his bill, and no answer is put in thereto, and no notice of an application for further time to answer is served within seven days after service of the notice of the amendment of the bill, the plaintiff, after the expiration of such seven days, but within fourteen days from the time of such service, is either to file his replication or set down the cause to be heard upon bill and answer; otherwise any defendant may move to dismiss for want of prosecution.

Where an application has been made for further time to answer an amended bill, but such application has been refused, then within fourteen days after such refusal.

- (2) Where the plaintiff amends his bill after answer, and a defendant, within seven days after the service of the notice of the amendment of the bill, serves notice of an application for further time to answer the amendments, but such application is refused, the plaintiff is, within fourteen

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FILING PLEADINGS.—NOTICE.

[ORDER XIX., SEC. I.]

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days after such *refusal*, either to file his replication, or to set down the cause to be heard on bill and answer; otherwise any defendant may move to dismiss the bill for want of prosecution.

- (3.) When a defendant puts in an answer to amendments, the plaintiff must either file his replication, or set down the cause to be heard on bill and answer, within fourteen days after the filing of such answer, unless he obtain, in the meantime, an order for leave to amend the bill; otherwise any defendant may move to dismiss the bill for want of prosecution.

Where an amended bill has been answered, then within 14 days from the filing of such answer.

FILING PLEADINGS. NOTICE.

XIX. When any party or solicitor causes an answer, demurrer, or replication, to be filed, he is to give notice thereof, on the same day, to the solicitor of the adverse party, or to the adverse party himself if he act in person. (g)

On the same day that an answer, demurrer, or replication has been filed, notice is to be given to the adverse party.

(g) A certificate of the registrar will be conclusive as to the filing of a pleading. (Beavan v. Burgess, 10 Jur. 63.)

In *Jones v. Jones*, 8 W. R. 638, it was held that omission to give notice of the filing of answer did not deprive the defendant of his right to move to dismiss; and see *Lowe v. Williams*, 12 Bea. 482; but our court has refused to act upon these decisions as rendering this order of no effect; and accordingly in *Kay v. Sanson*, *Grant's Cham. Rep.* 71, it was held by *Spragge, V. C.*, (*Esten, V. C.* concurring,) that when a motion is made to dismiss the bill for want of prosecution, the party moving must shew that notice of having put in an answer has been duly served.

It would seem that although under this order any party filing a pleading is to give notice thereof on the same day, an omission to serve such notice will not entitle the opposite party to treat such proceeding as a nullity, or as irregular. (*Smith v. Muirhead*, 2 *Grant's Ch. R.* 395.) The order would appear to be directory only, regard being had to the opinion of the court as expressed in the last cited case. On the argument of this case, *Bradstock v. Whatley*, 6 Bea. 61, (where the court relieved the party from the effects of the irregularity on payment of costs), and *Wright v. Angle*, 11 Jur. 987; s. c., 6 Hare, 107; and *Johnson v. Tucker*, 11 Jur. 466; s. c., 15 Sim. 599; 16 L. J. Ch. 442; were cited. In the last mentioned case

200; Daniell's Chan. P., 2nd edit. 1662.) Now it is obtained under this order; (Nicholl v. Elliott, 3 Grant's Ch. R. 586;) and it is important to consider the numerous cases which have arisen and which give its interpretation. The application may be made by the plaintiff *at any time after answer, or after the time for answering has expired*, and by the defendant *at any time after he has filed his answer*; an order obtained by a defendant *before* he has filed his answer, unless obtained by special leave of the court, would be irregular and would be discharged with costs. The order is obtained on *præcipe* and is usually termed "the four day order for production," four days being the time usually limited therein, and it should be obtained from the registrar's office in Toronto, if the bill be filed there, or from the office of the deputy-registrar of the county in which the bill is filed. When obtained a copy is served upon the solicitor of the party required to produce. If he does not comply with the order within the time thereby limited, a certificate of such non-compliance must be obtained under the hand of the registrar or deputy-registrar, as the case may be, and a motion made *ex parte* in chambers for an order *nisi*; this order will be granted on the production of such certificate and of the four day order with an admission or an affidavit of service thereof. The order *nisi* thus obtained must be served on the party required to produce *personally*—service on his solicitor is unnecessary, although in practice usual, but it is insufficient. See Order XLVI. of the Orders of 1853, sec. 9, which requires that the order *nisi* be personally served on the party required to obey the same. Care must be taken that upon the copy of the order *nisi* when served is endorsed the notice referred to in Order XLVI. of these orders, sec. 6. If this order be disobeyed an attachment will issue on motion made in chambers therefor.

In moving for an attachment proof must be tendered of the personal service of the order *nisi* and notice, and the affidavit should shew that the original order was shewn to the party served, and a certificate of non-compliance with the order *nisi* under the hand of the registrar must be produced, dated on the day on which the motion for the order absolute is made. Such is the practice in its simple form; but where a party complies by filing an *insufficient* affidavit, the practice will be hereinafter referred to under the authority of the reported decisions thereon. Where a party defendant filed an insufficient affidavit, in England, it was held that the plaintiff might except. (Lazarus v. Mozley, 5 Jur. N. S. 1120.) In our court the practice is to move *ex parte* for an order *nisi*, and if the court thinks it a case requiring notice, it will order the motion to be made after notice given therefor. When a defendant had filed three insufficient affidavits, and upon the plaintiffs obtaining an attachment filed a fourth one, the court refused to take it off the file as irregular. (Harford v. Lloyd, 23 L. J. Ch. 710.) It has been settled in England that a defendant who has made an affidavit under this order cannot be cross-examined thereupon. (Manby v. Bewicke, on appeal, 26 L. J. 20; s. c., 4 W. R. 757; over-ruling Kay v. Smith, 20 Bea. 566; s. c., 24 L. J. Ch. 788; 3 W. R. 622.) This practice has not, however, been followed in this country.

A question has been raised (Law v. The London Indisputable Policy Co., 10 Hare, App. xx.) whether a company or a corporation answering under their common seal are within this section. But in Ranger v. The Great Western Railway Company, 4 DeG. & J. 74; 7 W. R. 426; 33 L. T. 129; 28 L. J. Ch. 741; 5 Jur. N. S. 1191; the affidavit as to documents was directed to be made by one of the company's officers. This practice has been generally adopted in our courts, and the affidavit as to documents is usually required to be made by one of the principal officers of the corporation, and the process for non-production would, as against a corporation, be followed up by orders *nisi* and absolute, and thereafter by sequestration.

The affidavit should be made in the form settled by the court, and which is as follows:

EVIDENCE; PRODUCTION OF DOCUMENTS.

[ORDER XX., SEC. I.]

SCHEDULE K.

FORM OF AFFIDAVIT AS TO PRODUCTION OF DOCUMENTS UNDER
ORDER XX.

IN CHANCERY.

Between, &c.,

I ———, of ——— make oath and say as follows:

- (1). I say I have in my possession or power the documents relating to the matters in question in this suit, set forth in the first and second parts of the first schedule hereto annexed.
- (2). I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.
- (3). I further say,
(*State upon what grounds the objection is made, and verify the facts so far as may be.*)
- (4). I further say that I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit, set forth in the second schedule hereto annexed.
- (5). I further say, that the last mentioned documents were last in my possession or power on (*state when.*)
- (6). I further say,
(*State what has become of the last mentioned documents, and in whose possession they now are.*)
- (7). I further say, according to the best of my knowledge, remembrance, information, and belief, that I have not now, and never have had, in my own possession, custody or power, or in the possession, custody or power of my solicitors or agents, or solicitor or agent, or in the possession, custody or power of any other person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the first and second schedules hereto.

NOTE 1.—(*If the party denies having any, he is to make an affidavit in form of seventh paragraph, omitting the exception.*)

NOTE 2.—(*This form of affidavit, though not obligatory, will be satisfactory.*)

An affidavit in the form prescribed must be obtained from the party required to produce, inasmuch as the production can only be enforced upon the admissions contained therein, and cannot be obtained upon the oath of any person other than the party required to produce. (*Atkins v. Wright*, 14 Ves. 211; *Lamb v. Orton*, 1 Drew 414; 22 L. J. Ch. 718.) The court would refuse production on the affidavit of the party seeking it, and who might allege a certain document to be in the possession of the party against whom he sought the production; (*Lamb v. Orton*, *supra*;) and see *Wing v. Harvey*, 1 Sm. & Gif. App. x; 17 Jur. 481; where the court, on the

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application of the plaintiff and on the affidavit of his solicitor, refused production of documents alleged to be in the defendant's possession. The practitioner will therefore see the importance of procuring a *sufficient* affidavit from the party against whom he seeks production.

A plaintiff's right to production rests on the same grounds as his right to discovery generally; (*Swinborne v. Nelson*, 16 Beav. 416; *Clegg v. Edmonson*, 22 Beav. 125-137; *Quin v. Ratcliff*, 3 L. T. N. S. 365; *Rumbold v. Forteach*, 3 K. & J. 44;) whether the documents are to be produced or otherwise, is a matter to be determined by the court; whether they are sufficiently protected by the affidavit and the grounds therein disclosed, is also a matter for the determination of the court; but in any event the common affidavit must be made as to documents which must be set out. (*Quin v. Ratcliff*, 9 W. R. 65; 6 Jur. N. S. 1327; 3 L. T., N. S. 363; and see also *Nicholl v. Elliott*, 3 Grant's Chan. Rep. 536.) The defendant may resist production, but he cannot decline to make a *sufficient* affidavit, and the question of privileged documents is not a matter for his determination solely. (*The Rajah of Coorg v. The East India Company*, 25 L. J. Ch. 345; 2 Jur. N. S. 407; *Devaynes v. Robinson*, 20 Beav. 42; *Lafone v. Falkland Islands Company*, 27 L. J. Ch. 25; *Betts v. Menzies*, 26 L. J. Ch. 528; *Lancaster v. Evors*, 1 Phil. 349.)

The defendant is not obliged to produce documents in his possession relating exclusively to his own title. (*Sutherland v. Sutherland*, 17 Bea. 209; *Clegg v. Edmonson*, *supra*; *Lind v. Isle of Wight Ferry Company*, 8 W. R. 540; 2 L. T. N. S. 503; *Bishop of Winchester v. Bowker*, 9 W. R. 404; *Felkin v. Lord Herbert*, 9 W. R. 756; *Howard v. Robinson*, 4 Drew. 522; *Lawlor v. Murchison*, 3 Grant's Ch. Rep. 553.)

The principle seems to be that a party must not only shew that the documents in question relate to his title, but that they do not relate to the plaintiff's.

The rule is pretty clearly laid down in *Combe v. The Corporation of London*, 1 Y. & C. C. C. 631; 6 Jur. 571; 15 L. J. 80; 10 Jur. 57; to protect a defendant from the production or discovery of a document relating to the subject in dispute it is not sufficient that it should be evidence of *his* title or contains evidence which he intends or is entitled to use in support of *his* case, it must contain no matter supporting the plaintiff's case, or impeaching the defence, and the defendant must swear with a reasonable degree of distinctness that the document does contain no such matter. See also *Adams v. Fisher*, 3 M. & Cr. 526; *Lancaster v. Evors*, 1 Phil. 349; *Wigram Discovery*, p. 91; and *Marquis of Bute v. Glamorganshire Canal Co.*, 1 Phil. 681; 15 L. J. 60; 9 Jur. 1063. If documents merely shew the title of the plaintiff and some of the defendant's, who are in the same interest, and they do not shew any title whatever in the defendant asking their production, they will be protected. (*Lloyd v. Purves*, 4 U. C. L. J. 237.)

Where the plaintiff's and defendant's cases were so interwoven and inseparably connected that nothing could relate to the one without relating to the other, the defendant was ordered to produce papers connected with his own case, though he swore that they did not relate to the plaintiff's title or the case made by the bill. (*Hamilton v. Street*, 1 Grant's Ch. R. 327.) Where a party to a suit admits the possession of documents relating to the matters in question the opposite party is *prima facie* entitled to their production, and the party in whose custody they are must assign some ground for exempting them from the general rule. (*Howett v. Rees*, 2 Grant's Ch. R. 268.)

As has been before observed, though the defendant may not be compellable to produce such documents, he cannot, in any case, decline to make the affidavit in the form prescribed. (*Rumbold v. Forteach*, 3 K. & J. 44.) The affidavit must be in

strict terms, following the order to produce, and must set forth the numbers and particulars of the documents. (*Lazarus v. Mozley*, 5 Jur. N. S. 1119; 35 L. T. 8.) In this case the defendant swore that he had no documents in his possession, except such entries as might be contained in the books of his firm, which he objected to produce, stating that they were only in his possession jointly with another, who was not a party to the suit, the court required him to file an affidavit shewing the number and particulars of such documents. See also *Atkins v. Wright*, 14 Ves. 211. The court will not compel production by a defendant of documents in the possession of an agent for himself and a person not a party to the suit who is tenant in common with him of the property to which the documents relate. (*Edmonds v. Lord Foley*, 10 W. R. 210; *Bayley v. Cass*, 10 W. R. 370).

The defendant moreover is not allowed to decide for himself as to the relevancy of the documents in question. (*Caton v. Lewis*, 22 L. J., Ch. 946; *Bowes v. Fernie*, 3 M. & C. 632; *Mansell v. Feeney*, 9 W. R. 610; 4 L. T. N. S. 437.) See also *Lafone v. Falkland Islands Company*, 27 L. J., Ch. 25. The plaintiff's case as made by his bill, will, so far as an application for production is concerned, be assumed to be true, and for obvious reasons, if the court were obliged to wait until the hearing, it would be tantamount to refusing production altogether. (*Gresley v. Mousley*, 2 L. & J. 288; *Rumbold v. Forteach*, 3 K. & J. 44.)

The plaintiff, as a general rule, has a right to inspect all documents in the defendant's possession as will assist his case; and the right is even in certain cases extended to mortgagors, although generally a mortgagee is not compelled to produce his title deeds except upon payment of principal, interest, and costs. (*Howard v. Robinson*, 4 Drew. 522; 5 Jur. N. S. 136; 28 L. J. Ch. 671; 7 W. R. 223; this case will also be found in 5 U. C. L. J. 168; *Bugden v. South*, 26 L. J. Ch. 425; *Jones v. Jones, Kay*, App. vi.) A prior mortgagee has no right to see the deed of a subsequent mortgagee. (*Howard v. Robinson*, *supra*.) The mortgagee of a term is not entitled to the production of title deeds in the hands of a purchaser without notice of the fee. (*Hunt v. Elmes*, 27 Beav. 62; 5 Jur. N. S. 645; 28 L. J. Ch. 680; 7 W. R. 471.) This latter case is the most recent authority upon the question, and it was held that a purchaser for value without notice was not bound to produce the title deeds of an estate to a mortgagee whose security preceded the purchase, although the bill charged that the deeds were fraudulently retained by the mortgagor. A mortgagee was compelled to produce mortgage deed to mortgagor, that the latter might inspect an endorsement upon the instrument. (*Phillips v. Evans*, 2 Y. & C. C. C. 647.) See also the following cases on production:—(*Gandee v. Stansfield*, 4 DeG. & J. 1; 7 W. R. 321; *Wynne v. Humberstone*, 27 Beav. 421; 28 L. J. Ch. 281; on appeal 32 L. T. 206; *Greenwood v. Greenwood*, 6 W. R. 119; *Peile v. Stoddart*, 1 M. & G. 192; *De la Rue v. Dickinson*, 3 K. & J. 388; *Bates v. Christ's College*, 26 L. J. Ch. 449; *Hampson v. Hampson*, 26 L. J. Ch. 612.)

Letters passing between co-defendants are not privileged. (*Betts v. Menzies*, 26 L. J. 528.) Letters passing between solicitor and client are privileged. (*Ford v. De Pontes*, 7 W. R. 299; *Lawrence v. Campbell*, 4 Drew. 486; 7 W. R. 336; *Walsingham v. Goodricke*, 3 Hare, 122.) See also the later cases of *Marsh v. Keith*, 1 Drew. & S. 342; 9 W. R. 115; *Bluck v. Galeworthy*, 2 Gif. 543; *Telford v. Ruskin*, 1 Drew. & S. 148; *Thomas v. Rawlings*, 5 Jur. N. S. 676.

As to agents, see *Steele v. Stewart*, 1 Ph. 471; *Carpmael v. Powis*, 1 Ph. 687; *Glyn v. Caulfield*, 3 M. & G. 463, 467, and the cases there cited; *Calley v. Richards*, 19 Beav. 403; *Lafone v. Falkland Islands Co.*, 4 K. & J. 35; and *Colyer v. Colyer*, 9 W. R. 452; 4 L. T. N. S. 134.) As to arbitrators, see *Ponsford v. Swaine*, 4 L. T. N. S. 15; 1 Jo. & H. 433.

The court refused the production of documents pawned before the institution of the suit. (*Liddell v. Norton, Kay*, App. xi; 23 L. J. Ch. 169; *Re Williams*, 7 Jur.

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N. S. 323; *North v. Huber*, 7 Jur. N. S. 767.) A solicitor's lien is no defence against production. (*Hope v. Liddell*, 20 Beav. 438; on appeal 7 DeG. M. & G. 381; 24 L. J. Ch. 691; 1 Jur. N. S. 665; *Gaskell v. Chambers*, 28 L. J. Ch. 388; 26 Beav. 303; *Re Cameron's Coalbrook Railway Company*, 25 Beav. 1; *Re Gregson*, 26 Beav. 87.) An undertaking not to part with documents is no ground for resisting production. (*Penkethman v. White*, 2 W. R. 380) Depositing documents with a third person is no answer for non-production. (*Rogers v. Rogers*, 6 Jur. 497.) Documents in the hands of trustees cannot be ordered to be delivered up when the *cestuis que trusts* are not parties to the suit. (*Ford v. Dolphin*, 1 Drew 222; *Thomas v. Torrance*, *Grant's Cham.* 46; see also *Penney v. Goode*, 1 Drew 474; 22 L. J. Ch. 371; *Taylor v. Rundell*, Cr. & Ph. 104; *Reid v. Langlois*, 1 M. & G. 627; *Lazarus v. Mozley*, *supra*;) as to the production of documents not in the exclusive possession of the defendants, but only in their possession jointly with other persons, not parties to the suit.

Where an absent party is interested in documents the court will not as a general rule order their production, unless such absent party be brought before the court. (*Sweet v. Hunter*, 9 Jur. 807; *Bugden v. Tylee or South*, 21 Beav. 545; 26 L. J. Ch. 425; 3 Jur. N. S. 783.) This will not apply however in a case where such absent party is not a necessary party to the suit. (*Richardson v. Hastings*, 7 Beav. 354; 13 L. J. 416; *Robertson v. Shewell*, 15 Beav. 277.)

The order should be obtained before the hearing; after decree, or on cause being set down for further directions, it was held that there could be no order for production. (*Rippen v. Dolman*, 2 W. R. 432.) But see *Hart v. Montifiore*, 5 L. T. N. S. 441; where it was held that a defendant can after decree obtain an order to produce against a co-defendant.

The documents are to be deposited in the office of the registrar, or deputy registrar if the bill be filed in an outer county. If it appear from the affidavit that the documents are in constant use in the business of the deponent, and are necessary for the purposes of his business, the court will order production at the place of business; (*Grane v. Cooper*, 4 M. & C. 263;) or they may by arrangement be produced at the solicitor's office. (*Groves v. Groves*, 2 W. R. 86.)

If production be not obtained before the hearing, it can be enforced under the decree in the master's office. The master on an application being made to him for that purpose will give a direction for all deeds, books, papers, and documents to be brought into his office, and issue a warrant which should be underwritten in terms of the master's direction. The direction must be entered in the "Master's Book."

It will be necessary to consider the practice as to production in the master's office, and the process for enforcing it.

Having made the application, and obtained the direction and warrant, the latter should be served, and on the day of its return, search should be made as to the filing of the affidavit and the production of the documents, which under this practice must be left in the master's office. The common direction of the master that a party shall produce before him all deeds and documents, entitles the master to require them to be left, and refusal to leave is a disobedience of his warrant. (*Shirley v. Ferrers*, 1 M. & C. 304; *Sidden v. Leddiard*, 1 Sim. 388.) This latter case expressly decides that the order to produce involves an order to leave.

If no affidavit be filed, and the documents be not deposited, an application should be made to the master for his certificate of default, and upon this certificate the party requiring the production should move in Chambers for an order *nisi* for production. The master's certificate of non-production must be dated on the day of the motion. (*Hopkinson v. Leach*, 3 Swan. 98; *Carleton v. Smith*, 14 Ves. 180.) The

order *nisi* thus obtained need not be endorsed with the notice under Order XLVI., section 8, when served; and if the defendant appears by a solicitor, service on the latter will be good service. (*Hobson v. Sherwood*, 6 Beav. 68; 12 L. J. N. S. Ch. 447; 7 Jur. 687.) The practice as to the service of an order *nisi* for non-production in the master's office, differs in these particulars from the practice under the "four day order." If the order *nisi* be disobeyed, then a further certificate as to default must be procured from the master dated on the day of the motion, and an order absolute and attachment will be granted.

If an affidavit be filed, but the documents be not deposited, it is in the discretion of the master to grant a certificate. (*Henna v. Dunn*, 6 Mad. 340.) And if the master issues an irregular certificate, the practice is to move to discharge the order *nisi*, and to take the certificate off the files. (*Kemp v. Wade*, 2 Keen 686.) As to production in master's office, see also *Wormsley v. Sturt*, 22 Bea. 398.

The principle upon which production will be ordered in the master's office is the same as relates to production under the "four day" order; reference may therefore be made to the decisions already cited, which refer to this practice.

As to who may inspect. The order must be followed. A stranger may not; nor any person not strictly within the terms of the order. (*Summerfield v. Pritchard*, 17 Bea. 9; 17 Jur. 361.) An agent may, but he must be a legal agent, or a general agent, and not an agent appointed for the special purposes of the inspection. (*Draper v. The Manchester, Sheffield, and Lincolnshire Railway Co.*, 9 W. R. 117; 6 Jur. N. S. 1239; 30 L. J. Ch. 95; 3 L. T. N. S. 402; on Appeal, 9 W. R. 215; 30 L. J. Ch. 236; 7 Jur. N. S. 86.) A co-defendant cannot inspect. (*Bartley v. Bartley*, 1 Drew. 233.)

The information derived from documents produced must not be made public, nor should it be communicated to persons not parties to the suit. (*Williams v. The Prince of Wales Insurance Company*, 23 Bea. 338; 3 Jur. N. S. 55; *Reynolds v. Godlee*, 4 K. & J. 88; *Enthoven v. Cobb*, 5 DeG. & Sm. 595; on Appeal, 2 DeG. M. & G. 632.)

As soon as the purposes of discovery are answered, the documents will be ordered to be re-delivered to the producing party. (*Dunn v. Dunn*, 3 Drew. 17; 18 Jur. 1068; on appeal, 7 DeG. M. & G. 207; 1 Jur. N. S. 122.)

A defendant cannot obtain an order for the production of documents in the possession of his co-defendant. (*Attorney-General v. Clapham*, 10 Hare, App. lxviii.; *Burbidge v. Robinson*, 2 M. & G. 244; but see *Wynne v. Humberston*, 27 Beav. 421; 5 Jur. N. S. 5; 32 L. T. 268, 306; *Hart v. Montifore*, 5 L. T. N. S. 441.)

Affidavit to be made where party refuses to produce.

SEC. 2.—The affidavit to be made by a party who has been served with an order for the production of documents under the preceding section may be in the form or the effect set forth in schedule K., hereunder written. (i)

(i) For schedule K., see notes to the preceding section.

Exhibits may be proved by affidavit, upon order.

SEC. 3.—Any exhibit which, according to the present practice of the court might have been proved *viva voce*

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EVIDENCE; EXHIBITS.

[ORDER XX., SEC. III.]

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at the hearing, may be proved by the affidavit of a witness who would have been competent to prove the same at the hearing; an order having been taken out for that purpose. (*k*)

(*k*) Exhibits may be proved by affidavit at a hearing on bill and answer. (*Killaly v. Graham*, 2 Grant, 281.)

Documents used on the examination of witnesses before the court must be properly marked by the officer and referred to in the evidence, otherwise they cannot be read at the hearing. (*Hollywood v. Waters*, 8 Grant, 329.)

A patent which has been lost cannot be proved by parol evidence, the proper proof is an exemplification of the patent. (*McCullum v. Davis*, 8 U. C. Q. B. 150.)

A memorial coming from a registry office, if 30 years old does not require proof, and is of itself good secondary evidence of the deed; (*Marvin v. Hales*, 6 U. C. C. P. 208); if less than 30 years old, however, it must be proved before it can be used as secondary evidence. (*Ibid.*)

It would seem also for the purposes above mentioned, that a copy of the memorial certified by the registrar is as good evidence as the memorial itself. (*Lynch v. O'Hara*, 6 U. C. C. P. 259.)

Letters are admissible as exhibits though not mentioned in the pleadings. (*Wilmott v. Boulton*, 1 Grant, 479.)

Where an instrument is produced upon notice by an adverse party, who claims an interest in the cause under such instrument, the party calling production is not bound to prove its execution. (*Chisholm v. Sheldon*, 2 Grant's Chan. Rep. 181; and *Pearce v. Hooper*, 8 Taunt. 60; *Rearden v. Minter*, 5 Man. & Gr. 204.)

This section is practically of little force now, for as by the recent Orders of 10th January, 1863, for which see note to next section, the hearing of a cause is to follow immediately after the examination of the witnesses, it has been held that where a cause has been set down for examination and hearing, exhibits must be proved *viva voce* and not by affidavit. (*Dickenson v. Duffill*, per V. C. *Esten*, 20th February, 1863.) Where the evidence being closed, and at the time when the argument was about to be proceeded with, the plaintiff's counsel desired to put in a document which either proved itself, or could be proved by affidavit, the V. C. allowed the document to be put in, but refused to permit an affidavit to be read to prove it.

By Order of court promulgated on the 28th April, 1862, it is provided as follows:—

READING DEPOSITIONS IN OTHER CAUSES.

"Any party shall be entitled in future upon notice, without order to use depositions taken in another suit, in cases where under the present practice he is entitled to use such depositions upon obtaining the common order for that purpose."

The true test of their admission seems to be whether the first suit raised the same issue, and was virtually between the same parties, *i. e.*, between persons representing the same interests as the first. (*Lawrence v. Maule*, 4 Drw. 472; 28 L. J. Ch. 681; *s. c.*, 7 W. R. 314; *Borough v. Whichcote*, 3 Bro. P. C. 595; *Coke v. Fountain*,

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[ORDER XX., SEC. IV.]

1 Vern. 418; Eade v. Lingood, 1 Atk. 204; Humphreys v. Pensam, 1 M. & C. 580; Mackworth v. Penrose, 1 Dick. 50.) The fact that the plaintiff in the second suit was a co-defendant in the first suit, will not prevent the court from allowing the depositions of the witnesses in the first suit to be read, if the party against whom they are to be read had an opportunity of cross-examining the witnesses. (Nevil v. Johnson, 2 Vern. 447; Askew v. Poulterers' Company, 2 Ves. Sen. 89.) It is not necessary that the witnesses whose depositions are to be used should be dead; (City of London v. Perkins, 8 Bro. P. C. 602;) but see Carrington v. Cornock, 2 Sim. 567. It is necessary, says Daniell, in his Chan. Pr., 3rd ed., p. 697, "That to entitle a party to read the depositions taken in another cause, that the person against whom they are offered in evidence, or the person under whom he claims, should have been a party to such other cause." (Coke v. Fountain, 1 Vern. 413.)

Causes may be brought to a hearing upon affidavit evidence, by consent,

and when the evidence has been taken orally, particular facts, &c., may be proved by affidavit, by consent of parties, or by order of the court.

Infants, &c., bound by such consent, with the approbation of the court.

SEC. 4.—Causes may be brought to a hearing upon evidence adduced upon affidavit, by consent of parties; and, when the evidence in a cause has been taken orally, affidavits of particular witnesses, or affidavits as to particular facts or circumstances, may be used by consent, or by leave of the court; and such consent to hear the cause upon affidavit evidence, or to admit the affidavits of particular witnesses, or affidavits as to particular facts and circumstances, may be given on behalf of married women, or infants, or other persons under disability, with the approbation of the court. (l)

(l) This section is qualified in its application by Orders II. and III. of the Orders of court promulgated on the 10th day of January, 1863. These orders are as follows:—

"HEARINGS.

II. Causes are to be heard at the same time that the witnesses are examined upon the close of such examination. No evidence to be used on the hearing of a cause is to be taken before any examiner or officer of the court, unless by the order first had of the court or a judge thereof, upon special grounds adduced for that purpose.

III. When the examination of witnesses before a judge is to be had in any town or place, other than that in which the pleadings in the cause are filed, it shall be the duty of the party setting down the cause for such examination, to deliver to the registrar or deputy registrar with whom the pleadings are filed, a sufficient time before the day fixed for such examination, a præcipe requiring him to transmit to the registrar or deputy-registrar, at the place where such examination of witnesses is to be had, the pleadings in the cause; and at the same time to deposit with him a sufficient sum to cover the expense of transmitting and re-transmitting such pleadings, and thereupon it shall be the duty of such registrar or deputy-registrar forthwith to transmit the pleadings accordingly.

The fee payable to the deputy-registrars for setting down causes under the foregoing order is to be two pounds."

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[ORDER XX., SEC. V.]

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It also corresponds with the English Act, 15 & 16 Vic., ch. 86, sec. 38. And see English Orders, 5th Feb., 1861, Rules 10, 11 and 24.

SEC. 5.—Any witness who has made an affidavit filed by any party to a cause, *to be used at the hearing thereof*, is to be subject to oral cross-examination before the court or a deputy-master, or an examiner specially appointed for that purpose, in the same manner as if the evidence given by him in his affidavit had been given by him orally; and such witness is to attend before the court, or deputy-master, or examiner, as the case may be, upon being served with a writ of *subpœna ad testificandum* or *duces tecum*; and the expenses attending such cross-examination and re-examination are to be paid by the parties respectively, in like manner as if the witness to be cross-examined were the witness of the party cross-examining, and are to be deemed costs in the cause of such parties respectively, unless the court think fit to direct otherwise. (m)

Any witness who has made an affidavit, to be used at the hearing of the cause, may be cross-examined.

(m) English act 15 & 16 Vic., ch. 86, sec. 38.

The obligation to produce the witness is on the cross-examining party. (Winthrop v. Elderton, 1 W. R. 318; Spicer v. Dawson, 22 Beav. 282; Keymer v. Pering, 10 Sim. 179.) In England under the Order of February 5th, 1861, Rule 19, it is otherwise.

The cross-examination takes place immediately after the affidavit is filed, or may do so. (Clarke v. Law, 2 K. & J. 28; 2 Jur. N. S. 228; 4 W. R. 35; Bayley v. Cass, 10 W. R. 370.)

As to abandonment of affidavit or cross-examination, see Clarke v. Law, *supra*; Davey v. Durrant, 24 Bea. 411; 27 L. J. Ch. 503; 4 Jur. N. S. 398; on Appeal, 2 DeG. & J. 506; Oldfield v. Cobbett, 12 Bea. 91.)

Nor can a witness require the paragraph in his affidavit on which he is cross-examined to be shewn to him before answering the question put. (Gwynne v. Watney, 31 L. T. 281.) Where a document is referred to in an affidavit it will be ordered to be produced, in order to enable a proper cross-examination to be had thereon. (Bell v. Johnson, 1 Jo. & H. 682; 4 L. T. N. S. 637.) But the mere fact of the plaintiff during a *viva voce* examination of a defendant producing documents for the purpose of having them proved, will not entitle the defendant to their production for the general purposes of the suit. (Howcutt v. Rees, 2 Grant's Ch. R. 268.)

See Order of court of 17th September, 1866, which is as follows: "Witnesses

and parties may be examined before any examiner of this court in those counties in which there may be no deputy-master, until the appointment of a deputy-master in any such county."

And the Order promulgated on April 6th, 1857, which is as follows: "Whereas it is absolutely necessary for the proper despatch of business in the court, that the change hereinafter provided be made in the practice as regards the examination of witnesses and parties; it is therefore ordered that all examinations, out of examination term, of parties or witnesses, whether in a suit or in any matter or otherwise, be taken until further order before a deputy-master, or before a special examiner appointed for that purpose, unless the court or a judge thereof in chambers shall otherwise order upon application to be made for that purpose, which may be *ex parte*, but must be supported by affidavits setting forth the special grounds on which it is made."

These orders are, however, qualified by Orders II. and III., of Orders of 10th January, 1863. For these orders see note to preceding section.

Any party desiring to cross-examine a witness who has made an affidavit in any cause, *intended to be used at the hearing thereof*, is to give forty-eight hours' notice to the party on whose behalf such affidavit has been filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party may, if he think fit, be present thereat.

Forty-eight hours' notice of such cross-examination.

The re-examination of any such witness is to follow immediately upon the cross-examination, and is not to be delayed to any future time. (n)

The re-examination to follow immediately the cross-examination.

(n) As to evidence to be used at the hearing, the following points may be noticed; where evidence taken in Chancery is required to be used in another court, the proper course is to move on notice for an order for the purpose, and if the order be granted an officer of the Court of Chancery is sent to the other court with the depositions, retaining them in his possession, and merely allowing the other court the use of them. (*Thompson v. Ward*, 5 U. C. L. J. 41.)

Where a bill charged a defendant with notice, the plaintiff was allowed to give evidence of conversations in which notice was given to the defendant, though the bill did not mention the conversations: the fact of notice, and not any particular conversation being the point in issue. (*Barnhart v. Patterson*, 1 Grant's Chan. Rep. 459.)

Where the evidence was not sufficiently clear to entitle the plaintiff to a decree, but was such as rendered his equity probable, the court gave him the option of an issue at law, or to have his bill dismissed *without costs*. (*Carfrae v. Vanbuskirk*, 1 Grant, 589.)

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When the plaintiff and defendant mutually leave matters in the dark, of which it is necessary the court should have some evidence, a reference on these points will be directed; (Bethune v. Caulcutt, 1 Grant's Chan. R. 81; Farquharson v. Williamson, 1 Grant, 98; Chisholm v. Sheldon, 1 Grant, 108; Musselman v. Snider, 3 Grant, 158;) or the court will order the cause to stand over with liberty to supply the proof. (Attorney-General v. Garbutt, 5 Grant, 181.) So where the defendant had omitted to give evidence of matters of defence set up by his answer through oversight, the cause was ordered to stand over with liberty to both parties to go into evidence on those points. (Northey v. Moore, 5 Grant, 609.)

The plaintiff may go into evidence to contradict the answer though not put in issue by the bill. (Schram v. Armstrong, 1 U. C. Jur. 2, 327.)

Where the bill is amended by adding plaintiff's evidence of witnesses taken previously may be read at the hearing; (Chisholm v. Sheldon, 2 Grant, 178;) where, however, the amendment is by adding defendant's, such evidence of course could not be read against the new defendants. (*Ibid*, p. 180.)

This order, although entitled "Evidence to be used at the hearing," does not refer to the question of evidence generally. The first and second sections refer to production of documents in the cause, when and how obtained, and the affidavit required to be made thereon. The practitioner must not be misled by the terms of the marginal note to section 2, "affidavit to be made where party refuses to produce," inasmuch as, the affidavit is required as of necessity in all cases, and as will have already been seen, production cannot be enforced until an affidavit has been filed. Section 3 refers to the manner of proving exhibits. The present practice thereon has been referred to in the note to that section. Sections 4 and 5 refer to evidence which has been adduced by affidavit, which practice by consequence of the orders of the 10th January, 1863, providing that causes are to be heard on the close of the examination of witnesses will be hereafter but seldom resorted to. Indeed, these latter orders provide that no evidence is to be used on the hearing which has been taken before any examiner or officer of the court unless by special order first obtained therefor.

The cause having been set down for examination of witnesses and hearing, in manner hereinafter referred to in the notes to the order providing therefor, the evidence is taken very much in the same manner as on a trial at *nisi prius* of an action at law. The witnesses come into court, they are examined *viva voce*, before the judge, who takes down their evidence in writing, and when taken down it is read over to the witness, who thereupon signs the depositions. The depositions so taken down constitute the evidence to be used at the hearing, which at the close of the evidence is immediately proceeded with. This practice will materially diminish the delay and expense of proceedings in Chancery, and at the same time is a great advantage to suitors, which will no doubt be properly appreciated. The very just remarks of O. J. Wilmot, often quoted, in which he speaks "of the benefit of a *viva voce* examination, where the looks, the manner, and deportment of the witness are extremely material to confirm or discredit his testimony," have now their full force and advantage, since the judge having the evidence and its incidents fresh in his mind, proceeds to hear the arguments of counsel and to determine the decision in the cause immediately the evidence is closed.

When the cause is at issue by the filing of the replication, and the same has been set down for examination and hearing, the duty devolving on the practitioner is to prepare his evidence. The first question for consideration, is what is necessary to be proved, and the manner in which the proof is to be effected. When a cause is heard upon bill and answer, the answer will be taken to be true in all points, and no other evidence is to be admitted.

EXAMINATION OF PARTIES.

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It seems, however, to be generally conceded, that an exhibit may be proved on the hearing upon bill and answer. (*Chalk v. Raine*, 18 Jur. 981; following *Rowland v. Sturgis*, 2 Hare 520; *Neville v. Fitzgerald*, 2 Dru. & War. 580; and over-ruling *Jones v. Griffith*, 14 Sim. 262.)

A party may support his case:—1st, by evidence contained in the pleadings; 2ndly, by documentary evidence; 3rdly, by evidence of witnesses; and 4thly, by affidavit.

As to admissions on the record. The plaintiff cannot read his bill in support of his case unless where it is corroborated by the answer; thus if the plaintiff states an indenture in his bill, and the defendant in his answer admits it to have been properly executed, and to be of the tenor and effect set forth in the bill; in such a case the plaintiff having read the admission in the answer, can read his bill to shew the extent of the admission made by the defendant.

Where a bill has been taken *pro confesso* it may be read in evidence against the defendant against whom it has been taken *pro confesso*.

No proof can be admitted of any matter which is not noticed in the pleadings; (*Whaley v. Norton*, 1 Vern. 488; *Gordon v. Gordon*, 8 Sw. 472; *Clarke v. Turton*, 11 Ves. 240; *Williams v. Llewellyn*, 2 Y. & J. 68; *Hall v. Maltby*, 6 Pri. 240, 259; *Montesquieu v. Sandys*, 18 Ves. 302; *Powys v. Mansfield*, 6 Sim. 565;) these cases support the proposition that every fact must be introduced into the bill which the plaintiff intends to prove, and the same rule applies to answers. (*Smith v. Clarke*, 12 Ves. 477.)

INTERROGATORIES FOR THE EXAMINATION OF PARTIES AND WITNESSES.

No written interrogatories for the examination of parties or witnesses.

XXI. No written interrogatories for the examination of either parties or witnesses, either before or after decree, are to be filed, except by leave of the court. Examinations are to be *viva voce*, and may be conducted either by the parties or by their solicitors or counsel.

EXAMINATION OF PARTIES.

Any party to a suit may be examined at the instance of any party adverse in point of interest.

XXII. Any party to a suit may be examined as a witness by the party adverse in point of interest, without any special order for that purpose; and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination, as any other witness, except as hereinafter provided. And any person for whose immediate benefit a suit is prosecuted, or defended, is to be regarded as a party, for the purpose of this order. Provided always, that when it appears upon the hearing that any party

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examined under this order is united in interest with the examining party, the evidence so taken is not to be used on behalf of either the examining party or the examinee, but may be struck out at the hearing at the instance of any party affected thereby. (o)

(o) A party having received notice of being examined by the opposite party is not entitled to call for the production of papers in such opposite party's possession, *merely* the better to enable him to give his testimony. (*Howcutt v. Rees*, 2 Grant, 268.)

SEC. 2.—Any party defendant may be examined as a witness as heretofore, upon order for that purpose, on behalf either of the plaintiff, or of a co-defendant, upon points as to which the party to be examined is not interested. And any party plaintiff may be examined, under similar circumstances, by a co-plaintiff, or by a defendant. Provided, that where any party having an interest has been examined under this order, such evidence is not to be used on behalf either of the examining party, or of the party examined, but may be struck out at the hearing at the instance of any party affected thereby; but such examination is not to preclude the court from making a decree, either for or against the party examined. (p)

A defendant who has no interest may be examined, as heretofore, upon order.

A plaintiff may be examined under similar circumstances, without order.

The examination of an interested party may be struck out at the hearing.

(p) By the Orders of the 28th April, 1862, as to examination of parties to suits, which is as follows:—

“Any party defendant may be examined as a witness without order, on behalf either of the plaintiff or of a co-defendant; and any party plaintiff may be examined as a witness without order, by a co-plaintiff, or by a defendant, in cases where under the present practice such examination may be had upon the common order being obtained for that purpose.”

Under this section a defendant may be examined for the purposes of a motion before the time for answering has expired. (*McClennaghan v. Buchanan*, 7 Grant's Chan. R. 92.) The notice of motion must have been previously given. (*Ibid.*)

Although under this section any party to a suit may be examined by his adversary, yet the wife of such party cannot be so examined; but if she consent to be examined, her evidence cannot be afterwards objected to. (*Peterborough v. Conger*, Grant's Cham. 35; Con. St. U. C., cap. 32, sec. 5.)

Where a defendant is examined under order—which, however, is not now necessary—by a co-defendant, and the plaintiff and other co-defendants cross-examine him, he is thereby made a good witness in the cause against the parties so cross-examining. (*Grimshaw v. Parkes*, 6 U. C. L. J. 142.)

Where a plaintiff examines a defendant whose interest in the suit is such that a decree for the plaintiff must necessarily operate for the benefit of such defendant, such examination does not disentitle the plaintiff to relief against the other defendants. (*McLellan v. Maitland*, 1 Grant, 268.) This is a decision prior to the passing of this order.

It would seem that where a defendant (though he has parted with all interest in the property in question to a co-defendant) is interested in upholding the title of such co-defendant as being derived from himself, he will not be a competent witness on behalf of such co-defendant. (*McDonald v. Jarvis*, 5 Grant's Chan. R. 568.)

Any party examined may give evidence on his own behalf as to any point to which he has been examined in chief. SEC. 3.—Evidence taken under the first section of this order may be rebutted by adverse testimony; and any party examined as therein provided, may be further examined, on his own behalf, in relation to any matter respecting which he has been examined in chief.

And any party united in interest with the party examined may give evidence in like manner.

The explanatory examination will follow the examination in chief.

And where one of several plaintiffs or defendants, who are joint contractors, or united in interest, have been so examined, any other plaintiff or defendant, so united in interest, may also be examined on his own behalf, or on behalf of those united with him in interest, to the same extent as the party actually examined. Provided nevertheless, that such explanatory examination must be proceeded with immediately after the examination in chief, and not at any future period, except by leave of the court.

A party under examination may be ordered to produce deeds, &c., in his possession relevant to the matter in question.

Orders of deputy master, &c., subject to appeal.

SEC. 4.—Any party to the record who admits, upon his examination, that he has in his custody or power any deeds, papers, writings, or documents relating to the matters in question in the cause, is to produce the same for the inspection of the party examining him, upon the order of the court, or of the deputy-master, or examiner, as the case may be, before whom he is examined, and for that purpose a reasonable time is to be allowed. Either party may appeal from the order

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of such deputy-master, or examiner; and thereupon such deputy-master, or examiner, is to certify under his hand the question raised and the order made thereon; and the costs of such appeal are to be in the discretion of the court. But no party shall be obliged to produce any deed, paper, writing, or documents which would have been protected under the previous practice.

No order to be made as to documents entitled to protection.

SEC. 5.—Any person refusing or neglecting to attend at the time and place appointed for his examination under the first section of this order may be punished as for a contempt; and the party who desires the examination, in addition to any other remedy to which he may be entitled, may apply to the court, upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances; and the court, upon such application, may, if it think fit, order either that the bill be taken *pro confesso*, or that it be dismissed, as the case may be; and when, from the circumstances of the case, such order cannot be made consistently with the rights of other parties to the suit, then the court may make such order as to the enlarging the time for passing publication, or otherwise, as may seem just. (q)

When a party refuses to attend at the time and place appointed for the examination, he may be punished as for a contempt;

or the bill may be taken *pro confesso*, or dismissed, according to circumstances;

or the court in its discretion may make other order.

(q) Where a defendant out of the jurisdiction has answered but refuses to be examined under commission at the instance of the plaintiff, the cause will be allowed to be heard *pro confesso*. (Prentiss v. Bunker, 4 Grant, 147.)

SEC. 6.—When the examining party uses any portion of the evidence taken under the first section of this order, (but not otherwise,) then it shall be competent for those against whom it is used to put in the entire evidence so taken, as well that given in chief, as that in explanation.

Where any part of an examination taken under the first section of the order is used, the examinant may put in the whole.

SEC. 7.—Any party plaintiff examined under the first

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section of this order may be so examined at any time after answer; and any party defendant may be examined at any time after answer, or after the time for answering has expired, as the case may be; and such examination may be had without reference to the examination terms hereinafter established.

EXAMINATION OF WITNESSES.

XXIII. [Abrogated and discharged by order of court, dated the 23rd day of December, 1857.] (r)

(r) This order is abrogated and discharged by Order II. of the Orders promulgated on the 23rd December, 1857; and the notes upon the subject will be found appended to those orders, *infra*.

DISMISSAL OF THE BILL FOR WANT OF PROSECUTION.

XXIV. Any defendant (s) may move the court, upon notice, (t) that the bill may be dismissed with costs, (u) for want of prosecution, and the court may order the same accordingly in the following cases, viz. :—

Defendant may
move to dismiss,
in certain cases.

(s) English Consolidated Order, No. XXXIII., Rule 10.

A defendant who has taken the benefit of the Insolvent Act may move to dismiss with costs. (Lever or Levi v. Heritage, 26 Bea. 560; 5 Jur. N. S. 215; but see *Blanshard v. Drew*, 10 Sim. 240; *Kemball v. Walduck*, 18 Jur. 69;) *scus*, where the defendant is in contempt. (Anon. 15 Ves. 174.) Nor does the omission to give notice of the filing of the answer deprive him of the right. (*Jones v. Jones*, 3 W. R. 638.) A bill cannot be dismissed for want of prosecution after decree; (*Bluck v. Colnaghi*, 9 Sim. 411, and see note;) or pending a reference as to title; (*Gregory v. Spencer*, 11 Bea. 143; *Collins v. Greaves*, 5 Hare, 596;) or pending an order to stay proceedings; (*Futvoye v. Kennard*, 2 Gif. 533; 9 W. R. 297; 3 L. T. N. S. 687;) or pending a demurrer. (Anon. 2 Ves. Jun. 287.)

It is not enough for the plaintiff to shew in answer to a motion by one of several defendants, that he has not got in the answers of the other defendants; he must shew that he has used due diligence to get them in. (*Earl of Mornington v. Smith*, 9 Bea. 251; *Baldwin v. Damer*, 11 Jur. 723; *Stinton v. Taylor*, 4 Hare, 608.) But a motion to dismiss by one defendant who had put in his answer so long before as to be entitled to move, but whose co-defendant appearing by the same solicitor had not done so, was refused with costs. (*Winthrop v. Murray*, 7 Hare, 150.)

The plaintiff should acquaint the defendants who are in a position to move to dismiss, that the answers of the other defendants had not been got in, if such is the case. (*Adair v. Barrington*, 2 W. R. 361.)

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If the plaintiff appears on the motion and undertakes to speed the cause, and pays the costs of the motion, the court will usually grant the plaintiff time before dismissing his bill. Under the old practice, where the plaintiff undertakes to speed, he should file his replication within a week; (*McNab v. Gwynne*, 1 Grant's Chan. R. 151;) and that although he required a commission to examine witnesses out of the jurisdiction. (*Ibid.*)

Where a long delay has taken place, however, the court has discretion to refuse the request of the plaintiff for further time, and to dismiss his bill at once; (*Hancock v. Rollison*, 5 Jur. N. S. 1199; 1 L. T. N. S. 25; 6 U. C. L. J. 192;) where a delay of five months having taken place the court dismissed the bill at once.

Setting down and giving notice of motion for decree is a sufficient answer to a motion to dismiss for want of prosecution; (*Towers v. Foott*, Grant's Cham. Rep. 82; see also *Hughes v. Lewis*, 7 U. C. L. J. 22.)

So the service of an order to amend, duly obtained, is a sufficient answer to such motion. (*Hill v. Hill*, 2 Grant's Chan. Rep. 692.)

In such cases, however, the defendant would be entitled to bring on the motion for costs, if he was in a position to move to dismiss. (*Towers v. Foott*, and *Hughes v. Lewis*, *supra*.)

The service of a notice of motion for an order to amend, is, however, no answer to a motion to dismiss. (*McNab v. Gwynne*, 1 Grant 127.)

After a demurrer not set down, the bill cannot be dismissed for want of prosecution till the demurrer is disposed of. (*Done v. Allen*, Dick. 55.)

A defendant is entitled to the order to dismiss, though, through the death of a co-defendant, and the inability of the plaintiff to find his representatives, the plaintiff cannot proceed. (*Hall v. Green*, 2 U. C. Jur. 42.) In such a case, however, the court would probably grant the plaintiff a reasonable time in which to revive before dismissing. (*Ibid.*)

Where a defendant had answered, and the time for replication had expired, a motion to dismiss was refused, it appearing that such defendant was the president of an incorporated company, which was also a defendant, and had not answered. (*Rees v. Jacques*, 1 Grant, 352.) Sec. 1 of Order XVIII. seems to render this case obsolete.

The dismissal of a bill for want of prosecution cannot be set up in bar to another suit for the same matter. (*Hansard v. Hardy*, 18 Ves. 460.)

The court will not therefore dismiss a bill for want of prosecution without prejudice to the plaintiff filing a new one, as it would be mere surplusage. (*Gwynne v. McNab*, 2 Grant 124.)

The certificate of the registrar or deputy-registrar to be used on the motion should shew that no replication has been filed, and also that no further proceedings have been had. (*Thompson v. Buchanan*, 3 Grant, 652.) The defendant should also shew that an office copy of the answer has been duly served, (*ibid.*) or that notice of the filing of the answer has been duly served. (*Kay v. Sanson*, Grant's Cham. 71.)

(i) The notice ought to state the names of the parties fully and correctly. (*Davis v. Barrett*, 7 Bea. 171; and see *Rowlatt v. Cattell*, 2 Hare. 186; *Pollard v. Doyle*, 2 W. R. 509.) Where the notice omits the name of a defendant it is irregular. (*Pollard v. Doyle*, *supra*.)

Where it appeared that the plaintiff had not, through accident, received any per-

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sonal notice of the motion to dismiss, an order to dismiss for want of prosecution was discharged, on the plaintiff undertaking to speed the cause, and paying the costs of the application and of the order of dismissal. (*Campbell v. Ferris*, *Grant's Cham. Rep.* 80.)

(u) As to the costs included under the costs of a bill dismissed with costs for want of prosecution, see *Finden v. Stephens*, 11 Jur. 898; on appeal 12 Jur. 819; *Stevens v. Keating*, 1 M. & G. 659; 14 Jur. 157; *Rumbold v. Forteach*, 4 Jur. N. S. 608; *Batts v. Clifford*, 1 Jo. & H. 74.

As to where the dismissal will be *without costs* see *Blanshard v. Drew*, 10 Sim. 240; *Knox v. Brown*, 2 Bro. C. C. 186; *Kemball v. Walduck*, 18 Jur. 69; but see, *contra*, *Lever or Levi v. Heritage*, 26 Bea. 560; *Haddon v. Pegler*, 5 Jur. N. S. 1128.

As to allowing a plaintiff to dismiss his own bill without costs, see *Goodday v. Sleigh*, 8 W. R. 87; *Lister v. Leather*, 26 L. J. Chan. 557; s. c., 5 W. R. 666, and cases there cited. In *Broughton v. Lashmar*, 5 M. & Cr. 186, the plaintiff was allowed to dismiss a bill filed under a mistake, under which both he and the defendants had laboured, *without costs*.

Where a bill has been dismissed *with costs* as against some of the defendants for want of prosecution, it is no longer competent to the plaintiff to move to dismiss his bill *without costs* as against the rest. (*Troward v. Attwood*, 27 Bea. 85.)

- (1.) If the plaintiff, not having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, (v) or does not file the replication, (w) or set down the cause to be heard on bill and answer, within one month after the answer, or the last of the answers has been filed; (x) or

(v) A motion to dismiss pending an order giving leave to amend is irregular. (*Emerson v. Emerson*, 12 Jur. 978.) But the same rule does not apply where the order was that in default of amendment the bill should, *ipso facto*, stand dismissed. (*Dobede v. Edwards*, 11 Sim. 464.) And an order to amend obtained, but not served, before the notice of motion to dismiss is a nullity, and therefore no answer to the motion; (*Jones v. Charlemont*, 12 Jur. 889;) *secus* if served, but the plaintiff must in that case pay the costs. (*Waller v. Pedlington*, 4 Beav. 125; *Lester v. Archdale*, 8 Beav. 156; *Findlay v. Lawrence*, 11 Jur. 705.)

(w) When after notice the plaintiff files a replication, the court will only order that the plaintiff pay the costs of the motion. (*Corry v. Curlewis*, 8 Beav. 606.) But the defendant may bring his motion on for the costs, and such costs ought to be taxed costs. (*Hughes v. Lewis*, *Johns.* 696; s. c., 6 Jur. N. S. 442; 8 W. R. 292; 29 L. J. Ch. 424; 2 L. T. N. S. 693; following *Atty. Genl. v. Cooper*, 9 Sim. 379.)

(x) As to the meaning of these words see *Arnold v. Arnold*, 1 Phil. 805; *Dalton v. Hayter*, 7 Beav. 586; *Forman v. Gray*, 9 Beav. 196, 200; and *Sprye v. Reynell*, 10 Beav. 351; *Duncombe v. Lewis*, 10 Beav. 278; *Stinton v. Taylor*, 4 Hare, 608. It is now determined that the term "last answer" in this section means the last answer

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of the particular defendant making the motion to dismiss. But the term "last answer" with respect to the order for amending bills, it must be borne in mind, means the last answer of all the defendants. (*Collett v. Preston*, 3 M. & G. 432.)

- (2.) If the plaintiff, not having obtained an order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend; or (y)

(y) This rule is not confined to orders of course, but applies to all orders to amend. (*Armistead v. Durham*, 11 Beav. 428; and see *Bainbrigge v. Baddeley*, 12 Beav. 152; in both which cases the order to amend was given after demurrer allowed.) When the order was that the plaintiff should amend within a month, and in default that the bill be dismissed, an order to dismiss *ex parte* was held regular. (*Dobede v. Edwards*, 11 Sim. 454.) Where a demurrer is filed, and before it comes on for argument, the plaintiff obtained the common order to amend but does not amend within the period specified, the bill is gone. (*Hofick v. Reynolds*, 30 L. J. Ch. 407.)

- (3.) If the plaintiff, not having obtained an order to enlarge the time, does not set down the cause to be heard, and serve a notice of hearing within one month after publication has passed. (z)

(z) Where a plaintiff had set down the cause within the month, but had afterwards countermanded the notice of hearing, and struck the case out of the list of causes, a motion to dismiss for want of prosecution was refused, but under the circumstances without costs, *Blake, C.*, remarking that it was doubtful whether such notice could be countermanded, and if it were, whether the defendant has not a right nevertheless to go to a hearing. (*Richardson v. Moser*, Grant's Cham. 19.)

Sec. 2.—(a) Where the plaintiff has amended his bill, after answer, any defendant may move the court upon notice, that the bill may be dismissed with costs, for want of prosecution; if the plaintiff, not having obtained an order to enlarge the time, does not file the replication, or set down the cause to be heard on bill and answer, within the times following, viz:—

- (1.) Within fourteen days after service of the notice of the amendment of the bill, where no answer

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has been filed, and the defendant has not obtained or applied for time to answer.

- (2.) Within fourteen days after the refusal of an application for further time, in cases where the defendant, desiring to answer, has not put in his answer within seven days after service of the notice of the amendment of the bill, and the application for further time has been refused.
- (3.) Within fourteen days after the filing of the answer, in cases where the defendant has put in an answer to the amendments, unless the plaintiff, within such fourteen days, has obtained leave to re-amend the bill.

(a) English Consolidated Order No. XXXIII, Rule 12.

As to this section, see *Brown v. Butter*, 21 Beav. 615.

Sec. 3.—In every other case, where the plaintiff is delaying the suit unreasonably, any defendant may move the court, upon notice, that the bill may be dismissed with costs, for want of prosecution, after the expiration of one month from the time of filing his answer, in case the plaintiff, not having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard, on bill and answer, within such month; and, upon the hearing of such motion, the court is to make such order for the dismissal of the bill, or for the expediting of the suit, or as to the costs, as under the circumstances of the case may seem just.

Sec. 4.—In all cases where a person or party obtains an order from the court, or from a master, upon condition, and fails to perform or comply with such condition,

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he is to be considered to have waived or abandoned such order, as far as the same is beneficial to himself; and any other party or person interested in the matter, on the breach and non-performance of the condition, may either take such proceedings as the order in such case may warrant, or such proceedings as might have been taken if no such order had been made.

Effect of party obtaining an order on condition and failing to perform it.

SETTING DOWN THE CAUSE.—HEARING.—SUBPENA TO HEAR JUDGMENT.

XXV. [Abrogated and discharged by order of court dated the 23rd day of December, 1857.] (b)

(b) This order is abrogated and discharged by Order II. of the Orders promulgated on the 23rd December, 1857; and the notes upon the subject will be found appended to these orders, *infra*.

LEGAL RIGHTS ; HOW DECIDED.

XXVI. (c) In cases where according to the present practice the court is in the habit of refusing equitable relief until the party seeking such relief has established his legal title or right in a proceeding at law, the court will itself determine such title or right without requiring the party seeking such relief to proceed at law to establish the same; but the court may require the right or title to be established at law, whenever, in its discretion, it considers that course expedient.

Court may determine legal title of party seeking relief without requiring parties to proceed to law.

(c) English act 15 & 16 Vic., ch. 86, sec. 62.

When some of the parties were infants and therefore unable to bind themselves, it was held that the court had no power, even by consent, to decide a purely legal question so as to bind the infants. (*Webb v. Byng*, 2 Jur. N. S. 1242.) See further, *Dufaur v. Sigel*, 4 DeG. M. & G. 520; 22 L. J. Ch. 678, 681.)

INJUNCTION TO STAY PROCEEDINGS AT LAW.

XXVII. (d) No injunction to stay proceedings at law is to be granted, for default of answer to the bill; Practice as to injunction to stay proceedings at

law, assimilated
to practice as to
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tions.

but such injunction may be granted upon interlocutory application, in like manner as other special injunctions are granted.

(d) English act 15 and 16 Vic., ch. 86, sec. 58.

The plaintiff can obtain an injunction immediately on the filing of the bill. (Harris v. Collett, 26 Bea. 225.)

As to injunctions to stay proceedings at law and the plaintiff's right thereto. See Senior v. Pritchard, 16 Bea. 478; Lovell v. Galloway, 17 Bea. 8; Fitzgerald v. Bult, 9 Hare, App. lxx.; Garle v. Robinson, 3 Jur. N. S. 638; Magnay v. The Mines Royal Company, 3 Drew. 180; 24 L. J. Chan. 413; Fox v. Hill, 2 DeG. & J. 353; 32 L. T. 230; and Harris v. Collett, 26 Bea. 222.

An affidavit of merits must be made in support of the application. (Mollett v. Enquist, 25 Bea. 609; 27 L. J. Chan. 815; 4 Jur. N. S. 1009; 31 L. T. 279.) In what cases granted *ex parte*. See Fisher v. Baldwin, 1 W. R. 484; John v. John, 1 L. T. N. S. 385; Zulueta v. Vinent, 15 Bea. 575.

Under the "Common Law Procedure Act," courts of law have power to grant injunctions in certain cases. (Sec. cclxxxiii., Harrison's Common Law Procedure Act, p. 460, *et seq.* notes and cases there cited.)

The existence of this jurisdiction, however, does not interfere with the power of a court of equity to restrain actions at law upon the grounds on which it formerly acted in such cases. (Magnay v. The Mines Royal Company, 24 L. J. Chan. 413; Croxkey v. European and American Steam Shipping Company, 1 J. & H. 108; The British Empire Shipping Company v. Somes, 26 L. J. Chan. 759; 8 K. & J. 433; Hodgson v. Duce, 4 W. R. 576; Walker v. Micklethwait, 1 Drew. & Sm. 49; Kingsford v. Swinford, 7 W. R. 215; Gompertz v. Pooley, 4 Drew. 448; 7 W. R. 275; Evans v. Bremridge, 2 K. & J. 174, 181; on appeal 20 Jur. 811; 27 L. T. 8; 25 L. J. Chan. 334; Terrell v. Higgs, 1 DeG. & J. 388, 390.)

A bill will not lie for the discovery of facts which the plaintiff in equity may prove *alibi* in his defence at law. And where several persons severally liable on promissory note or bill of exchange, are jointly sued at law by the holder, one of the defendants in the execution at law, cannot obtain discovery against the plaintiff at law, and the other defendants as between themselves, not being litigating parties, but witnesses; a bill filed for this purpose is demurrable. (Hamilton v. Phipps, 7 Grant's Chan. R. 483, and the cases there cited.) And as to the practice with reference to injunctions to stay proceedings. (Fitzgerald v. Bult, 9 Hare, App. lxx.; Lovell v. Galloway, 17 Bea. 1; Senior v. Pritchard, 16 Bea. 478; Mollett, v. Enquist, 4 Jur. N. S. 1009.)

If, however, a defendant at law had pleaded equitable pleas, to which the plaintiff had replied, and he then filed a bill for an injunction setting up the same case as his defence at law, the injunction will be refused. (Farebrother v. Welchman, 3 Drew. 122; 24 L. J. Chan. 410; Prothero v. Phelps, 25 L. J. Chan. 105; Terrell v. Higgs, *supra*.) The mere fact of an equitable defence being pleaded at law, does not prevent a bill being filed, at least if the true equitable question is not likely to be touched. (Evans v. Bremridge, 25 L. J. Ch. 102; 26 L. T. 164; 4 W. R. 350; 2 K. & J. 181; Clarke v. Lawrie, 28 L. T. 126, Exchequer.)

As to proceeding in law and equity at the same time, see Boyd v. Heinzelman, 1 V. & B. 381; Hole v. Pearce, 5 Hare, 408; Williams v. Roberts, 8 Hare, 315. As

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INJUNCTION STATING PROCEEDINGS AT LAW.

[ORDER XXVII.]

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to restraining plaintiff where he proceeds at law and in equity at the same time. (Wedderburn v. Wedderburn, 2 Beav. 208.) A party cannot at the same time file a bill for specific performance and bring an action for use and occupation; (Carriok v. Young, 4 Madd. 487; Ambrose v. Nott, 2 Hare, 649;) or an action for damages for breach of contract. (Prothero v. Phelps, 25 L. J. Chan. 105.)

See also the cases cited *supra* in note as to "order to elect," page 63 *et seq.*

A party mispleading at law, is not entitled to seek relief in a Court of Equity. (Morrison v. McLean, 7 Grant's Chan. Rep. 167.) And where a defendant at law filed his bill, seeking to restrain proceedings at law, and alleging as grounds for such relief, facts, which if they had been properly pleaded at law, would have afforded a good defence, the court, without enquiring into the merits, dismissed the bill. (*Ibid.*) Matters which are properly cognizable at common law, and which have been, or might have been the subject of cognizance in the common law court, will not be dealt with by Courts of Equity.

Query, whether the Court of Chancery in this province will in any case grant an injunction to restrain an action in the Division Court. (Heward v. Harris, 5 Grant's Ch. Rep. 226.) Has not the Division Court itself full power and jurisdiction to do complete justice without compelling a party to resort to the Court of Chancery? (*Ibid.*)

The court expects great promptitude where a party applies to stay a trial at law, and a party may by his delay deprive himself of the benefit, if any, which he might otherwise have derived from his application to the Court of Equity for relief. (M'Lure v. Ripley, 2 M. & G. 276, *note*.)

The court will, however, not only on a proper case interfere to restrain trial, or execution at law; (Turner v. Wright, 1 J. & W. 290; Williams v. Roberts, 8 Hare, 815;) but even *after execution*, to stay money in the hands of the sheriff, or delivery of possession. (Daniell's Ch. Pr., 3rd ed., 1220.) And so where the owner of land sold a portion thereof, and let the purchaser into possession, who made improvements, and afterwards agreed to sell all his improvements to his vendor; and for the purpose of ascertaining the amount to be paid referred the matter to arbitrators, who made an award, but the terms of which were not complied with, and the vendor brought an action of ejectment against the party in possession, and sought to execute his writ of possession; the court granted an injunction restraining the vendor from executing his writ. (Cook v. Smith, 4 Grant's Ch. Rep. 441.)

It must be observed that injunctions to stay proceedings at law are granted either before or after the commencement of the action, or to stay the trial; or after verdict, to stay judgment; after judgment to stay execution, or proceedings under an execution; and if execution has taken place to stay the money in the hands of the sheriff. (Eden on Injunction, 44.)

Where an instrument has been obtained by fraud or undue influence, proceedings on it at law will be restrained. (Lloyd v. Clark, 6 Beav. 809.)

It is essential that a plaintiff seeking to restrain an action at law should show some grounds upon which the action can be maintained, for if he does not do so, his bill will be open to a demurrer; (Derbyshire, Staffordshire, and Warwickshire Railway Co. v. Serrell, 2 DeG. & Sm. 353;) where it was held that a bill seeking to restrain an action at law and not shewing any grounds on which the action could be sustained was demurrable; and see the cases there cited.

Nor has a court of equity any jurisdiction to relieve a plaintiff against a judgment

at law where the case in equity proceeds upon a ground equally available at law and in equity. (*Harrison v. Nettleship*, 2 M. & K. 423.)

This principle has been upheld in numerous decisions which have followed *Harrison v. Nettleship*; *ex gr.*; *Davies v. Stainbank*, 6 DeG. M. & G. 685; *Thompson v. Derham*, *Thompson v. Goodman*, 1 Hare, 379, 380; and especially since the Common Law Procedure Act already referred to; and see *Farebrother v. Welchman* cited *supra*, 8 Drew. 122. Neither will a court of equity restrain execution upon its own opinion of a point of law after a court of law has decided it in favour of the demand. If a party has not effectually availed himself of a defence at law, or a court of law has erroneously decided a point of pure law, it is no ground for equitable interference. (*Simpson v. Lord Howden*, 3 M. & C. 108.) A court of equity will not relieve against a mistake in pleading. In *Stephenson v. Wilson*, 2 Vern. 325, the defendant at law by mistake pleaded a false plea, and the verdict went for the plaintiff, although the merits were not tried, yet equity would not relieve; and again, in *Blackhall v. Combs*, 2 P. W. 70, it was held that the court would not relieve on a matter purely of misleading; and in *Protheroe v. Forman*, 2 Sw. 238, it is stated that Lord *Thurlow* was very tenacious of the doctrine, that a party who had had an opportunity of trial at law, and would not avail himself of it, could not come to a court of equity for relief. The court is very tender how they help a defendant after a trial at law in a matter where such defendant had an opportunity to defend himself. Still such cases there are in which equity will relieve after a verdict in a matter where the defendant at law might properly have defended himself. (*Protheroe v. Forman*, 2 Sw. 232.) See also *Field v. Beaumont*, 1 Sw. 204; *Holworthy v. Mortlock*, 1 Cox, 141; *Stevens v. Praed*, 2 Ves. Jun. 519; *Bateman v. Willoc*, 1 S. & L. 201; *Ware v. Horwood*, 14 Ves. 31; *Dunn v. Cox*, 11 Hare, 61; as cases where a court of equity will not relieve against a mistake in pleading, or in the conduct of a cause at law.

That a court of equity will sometimes relieve after verdict, although a defence might have been made at law, but has been omitted without any laches on the part of the defendant, is clear; see *Protheroe v. Forman*, cited *supra*; and *Hankey v. Vernon*, 2 Cox, 12; where an injunction was granted. In this case the defendant failed in proving a material fact at law, of which he afterwards obtained a discovery from the adverse party in equity. He would not have been permitted to prove the fact, however, by any other witnesses whom he could have examined at law.

Where an injunction is granted staying execution on a verdict or an award, it is on the terms of paying the amount into court. (*Clarke v. Manners*, 2 U. C. Jur. 4.)

After a decree or an order obtained for administration which is in effect a judgment for the benefit of all the creditors, all proceedings at law by any of them will be restrained.

The principle under which the court acts is clearly laid down in *Drewry v. Thacker*, 8 Sw. 541. "It has indeed been long settled that when this court has taken into its hands the administration of assets, it will stay proceedings against them at law." (*Morrice v. The Bank of England*, Ca. t., Talbot, 217; *Martin v. Martin*, 1 Ves. Sr. 211; *Douglas v. Clay*, Dick, 393; *Perry v. Phelps*, 10 Ves. 40; *Brooks v. Reynolds*, 1 Bro. C. C., 188; s. c., Dick, 603; *Clarke v. Ormonde*, Jac. 123; *Largan v. Bowen*, 1 S. & L. 299; *Rouse v. Jones*, 1 Ph. 462; *Vernon v. Thellusson*, 1 Ph. 466; *Belmore v. Belmore*, 12 Ir. Eq. R. 493;) but not until a decree, or an order, has been obtained. (*Rush v. Higga*, 4 Ves. 638; *Teague v. Richards*, 11 Sim 46.) See also *Ranken v. Harwood*, 5 Hare, 215; *Lee v. Park*, 1 Keen, 714.

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he first had notice of the decree. (*Dyer v. Kearsley*, 2 Mer. 482*n*; *Jackson v. Leaf*, 1 J. & W. 229; *Vernon v. Thellusson*, cited *supra*;) and he can prove for such costs in addition to his debt if he discontinues his action; *Goate v. Fryer*, 3 Bro. C. C. 22; but he will not be entitled to the costs of the motion to restrain his proceedings. (*Currie v. Bowyer*, 3 Mad. 456; *Powell v. Powell*, 12 Ir. Eq. R. 501.) But see *Jones v. Jones*, 5 Sim. 678.

And if the creditor proceeds he will be ordered to pay the costs of the motion to restrain his proceedings, which may be set off against the costs of his action at law to which he would be entitled, namely, such costs as he had incurred previous to his receiving notice of the decree or administration order. (*Gardner v. Garrett*, 20 Beav. 469.)

It seems also that the court will restrain a person within its jurisdiction, from taking proceedings in courts out of its jurisdiction; as in foreign countries, the United States, and elsewhere. It interferes, not upon any pretension to control or overrule the decisions of such courts, but *in personam*, on the circumstance of the party on whom the order is made being within the power of the court. See the *Marquis of Breadalbane v. The Marquis of Chandos*, 2 M. & C. 711; *Bushby v. Munday*, 5 Mad. 297. (The principles upon which this case was decided will be found at page 309.) And see *Lord Portarlington v. Soulbey*, 3 M. & K. 104, where the question as to the jurisdiction of the Court of Chancery to stay the proceedings of parties in foreign courts is very fully discussed; and *Bunbury v. Bunbury*, 1 Beav. 318.

But see also *Ostell v. Le Page*, 2 DeG. M. & G. 892; *Kennedy v. Cassillis*, 2 Sw. 313; *Carron Iron Co. v. MacLaren*, 5 H. Lord Cases, 439.

As to the old practice with respect to granting injunctions to stay proceedings at law, see *Daniell's Ch. Pr.*, 2nd edit., 1470; *Anderson v. Noble*, 1 Drew, 143; and *Lovell v. Galloway*, 17 Beav. 3.

The present practice as to granting injunctions is fully considered in *Smith's Ch. Pr.*, 7th edit., 819, *et seq.*; *Daniell's Ch. Pr.*, 3rd edit., 1209, 1266. The bill must pray specially the relief. (*Wood v. Beadell*, 3 Sim. 273.)

SEC. 2.—On any motion to obtain or dissolve a special injunction, affidavits may be used to support or contradict the answer. (e)

Affidavits may be used to support or contradict the answer.

(e) English act, 15 & 16 Vic., ch. 86, sec. 59.

A defendant who had not submitted to be cross-examined upon his answer was not allowed to read it in opposition to a motion for an injunction. (*Wightman v. Wheelton*, 23 Bea. 397; 3 Jur. N. S. 124; 5 W. R. 337; 28 L. T. 316). But it seems that the plaintiff cannot cross-examine the defendant on such answer unless the latter intends to use it. (*Ibid.*) See also *Abadom v. Abadom*, 24 Bea. 243; and *Rehden v. Wesley*, 26 Bea. 432.

DECREES MERELY DECLARATORY.

XXVIII. No suit is to be open to objection on the ground that a merely declaratory decree or order is

sought thereby; but the court may make a binding declaration of right without granting consequential relief. (f)

No suit to be ob-
jected to because
only declaratory
order sought.

(f) English act, 15 & 16 Vic., ch. 86, sec. 50.

Where a declaration is asked, and also an injunction, such injunction is consequential relief. (*Marsh v. Keith*, 1 Drew & Sm. 842; 9 W. R. 115.)

It has been held (notwithstanding the cases of *Fletcher v. Rogers*, 10 Hare App. xlii.; 1 W. R. 125; and *Wright v. King*, 2 W. R. 405), that this order gave the court no power to declare future rights. (*Lady Langdale v. Briggs*, 26 L. J. Ch. 27, 45; 2 Jur. N. S. 982.) See also this case as reported in 3 Sm. & G. 246; 25 L. J., Ch. 100; and see *Burt v. Sturt*, 1 W. R. 145; *Greenwood v. Sutherland*, 10 Hare, App. xii.; *Garlick v. Lawson*, 10 Hare, App. xv.) In this latter case the court refused to make a binding declaration as to the interest of parties entitled in reversion. Reference should also be made to *Gosling v. Gosling*, 1 Jo. 265; 5 Jur. N. S. 910; and to *Fyfe v. Arbuthnot*, 1 DeG. & J. 406; and *Bell v. Cade*, 10 W. R. 38. With these authorities for reference, it seems clear that *Fletcher v. Rogers*, and *Wright v. King*, cannot now be relied upon. Nor will the court, under this order, make an order guarding against claims which may never arise. (*Jackson v. Turnley*, 1 Drew. 617; 22 L. J. Ch. 949; 17 Jur. 643; 1 W. R. 461; *Rooke v. Lord Kensington*, 2 K. & J. 753; 25 L. J. Ch. 796; 28 L. T. 68.)

The court will not make a decree declaratory of a mere legal right. (*Trustees of the Birkenhead Docks v. Laird*, 4 DeG. M. & G. 732, 738; 23 L. J. Ch. 457; 18 Jur. 883; *Bristow v. Whitmore*, 4 K. & J. 743; 7 W. R. 150; *Norman v. Johnson*, 8 W. R. 300; 6 Jur. N. S. 905.)

The court cannot under this order make a declaration of right, unless it is one on which the court *could* act, if required, by granting consequential relief. (*Bristow v. Whitmore*, 4 K. & J. 743.)

Therefore if the court could not act by granting consequential relief, if required, it will not entertain the suit. (*Macklem v. Cummings*, 7 Grant, 318.)

PARTIAL DECREES.

XXIX. When questions arise between parties (who are some only of those) interested in the property respecting which the question arises; or where the property in question is comprised with other property in the same settlement, will, or other instrument, the court may adjudicate on the questions arising between such parties, without making the other parties interested in the property respecting which the question arises, or interested under the settlement, will, or other instrument,

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parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or instrument to be executed under the direction of the court, and without taking the accounts of the trustees, or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions have arisen; (g) but when the court is of opinion that the application is fraudulent, or collusive, or that for some other reason the application ought not to be entertained, it may refuse to make the order prayed.

or under a settlement, &c., without making the other parties interested in the property, or under the settlement, parties.

(g) This order only applies when some of the persons interested in the question at issue, in every point of view, are before the court. (*Swallow v. Binns*, 9 Hare, App. xlvii.; 17 Jur. 295.) Thus when the question was between the claims of the surviving children, and the representatives of deceased children under a settlement, the court refused to proceed, in the absence of any party representing the interests of the deceased children. (*Ibid.*) A party will not be allowed to proceed with the case under this order by striking out the names of some of the defendants, who are out of the jurisdiction and proceeding without them. (*Lanham v. Pirie*, 2 Jur. N. S. 1201; 26 L. J. Ch 80.) It must be remembered that this order does not render the decree of the court binding on the absent parties as Order VI., sec. 2, rule 6 does, when notice of the decree has been served upon them. (*Doody v. Higgins*, 9 Hare, App. xxxiii.; 2 Jur. N. S. 1068.)

This order enables the court to direct the administration of one or more specific trusts created by an instrument, without directing the performance of all. (*Parnell v. Hingston*, 3 Sm. & G. 337; *Prentice v. Prentice*, 10 Hare, App. xxiii.)

Taken from English act, 15 & 16 Vic., ch. 86, sec. 61.

DECREE MAY BE MADE IN THE ABSENCE OF A PERSONAL REPRESENTATIVE.

XXX. Where, in any suit or other proceeding before the court, it is made to appear that a deceased person who was interested in the matters in question has no legal representative, the court (h) may either proceed in the absence of any person representing the estate of such deceased person, or may appoint some person (i) to represent such estate for all the purposes of the suit or other proceedings, on such notice to such person or persons, if any, as the court may think fit, either specially,

Court may proceed without any personal representative of a deceased person, where none has been appointed;

[ORDER XXX.]

or it may appoint or by public advertisement; and the order so made, (k) and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the court.

(h) English act, 15 & 16 Vic., ch. 86, sec. 44.

This order does not apply to cases where parties have a substantial or beneficial interest, but applies only to cases of mere formal parties. (Sherwood v. Free-land, 6 Grant's Ch. R. 805; 4 Upper Canada L. J. 43.) To induce the court to act under this order it is necessary first, that the interest of the deceased defendant in the matter in question in the suit should be of little consequence, and secondly that there should be a difficulty in obtaining representation to his estate. (Daniell's Chan. Practice, 3rd edit., 1158.) Thus, it was held that a suit instituted by creditors under a trust deed made for their benefit, might proceed against the trustees, without a personal representative of a deceased debtor, the author of the trust, where no such representative existed and the estate was insolvent. (Chaffers v. Headlam, 9 Hare, App. xlvii.; Davies v. Boulcott, 1 Drew & Sm. 23; 8 W. R. 206; where the deceased was the grantor of an annuity, and had died insolvent, and whose executors had renounced probate.) In Rogers v. Jones, 1 Sm. & G. 17; 16 Jur. 968; 1 W. R. 14; 20 L. T. 50; and Bessant v. Noble, 26 L. J. Ch. 236; when one of two executors, co-defendants in an administration suit, who was also a residuary legatee, but who had not proved the will or acted in the trusts thereof, died insolvent and without a representative, after the usual order for taking the accounts had been made, it was held that the suit might proceed as if his legal personal representative had been served. And in Band v. Randle, 2 Eq. Rep. 489; 2 W. R. 331; where one of the executors of the testatrix in the cause had died intestate and insolvent, and ineffectual attempts had been made to obtain representation to him, the court allowed an administration suit to proceed in the absence of such representation.

As a general rule, when the next of kin expressly refuses to administer, the court, it seems, will incline to act under this order. (Haw. v. Vickers, 1 W. R., 242; Tarratt v. Lloyd, 2 Jur. N. S. 371.) In Whiteaves v. Melville, 5 W. R. 676; Davies v. Boulcott, *ante*, the court paid no attention to a notice calling upon him to administer.

As to cases where a will has been proved abroad, see Hewitson v. Todhunter, 22 L. J. Ch. 76; Sutherland v. DeVienne, 2 Jur. N. S. 301; Bliss v. Putnam, 29 Beavan, 20; 30 L. J. Ch. 38; 7 Jur. N. S. 12.

This order, too, would apply where the claim of a deceased defendant is consequent on a remote possibility, (Magnay v. Davidson, 9 Hare, App. lxxxi.) and when the interests of the deceased defendant are identical with those of the plaintiff, or with those of other parties represented; (Hewitson v. Todhunter, *supra*; Cox v. Taylor, 22 L. J. Ch. 910; and Long v. Storie, Kay App. xii; 23 L. J. Ch. 200;) and where the interest has been transmitted to a person who dies without perfecting

title; see D. 295; and the 7 Jur. 219.

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(i) The property be appointed administrator.

Reference may be made to Ashmall v. Wood.

No appointment may be appointed. (The & Co., Company v.

(k) As to the fact Hele v. Lord Bexley.

The application is drawn up, to the

The order may be made *supra*; and in the parties.

PERSONAL REPRESENTATIVE.—DECREE.
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title; see *Davies v. Boulcott*, *supra*; *Swallow v. Binns*, 9 Hare, App. xlvii.; 17 Jur. 295; and the *Dean of Ely v. Gayford* or *Edwards*, 16 Beav. 561; 22 L. J. Ch. 629; 7 Jur. 219.

But it has been held that this order does not apply, when the personal representative would have active duties to perform. (*Fowler v. Bayldon*, 9 Hare, App. lxxviii.) Nor is it said when he would represent interests adverse to the plaintiffs; (*Headden v. Emmott*, 22 L. T. 166;) but see also the report of *Dean of Ely v. Gayford*, *supra*; and *Gibson v. Willa*, 21 Beav. 620.

Where the object of the suit is to administer the estate of the intestate this order will not apply; (*Silver v. Stein*, 1 Drew 295; *Groves v. Levi* or *Lane*, 9 Hare, App. xlvii.(n); 16 Jur. 1061;) but see also *Jones v. Foulkes*, 10 W. R. 55; where by consent the order was made under the general jurisdiction; and see *Donald v. Bather*, 16 Beav. 26.

Nor will this order apply where the object is to set aside the deed executed by the intestate; (*James v. Aston*, 25 L. J. Ch. 343; 2 Jur. N. S. 224;) nor when a decree is sought against a person to be represented; (*Bruiton v. Birch*, 22 L. J. Ch. 911;) see also *Goddard v. Haslam*, 1 Jur. N. S. 251; 8 W. R. 357.

As to where a party is jointly liable; see *Ashmall v. Wood*, 25 L. J. 23; 1 Jur. N. S. 1180; 4 W. R. 60, 110.

When the entire adverse interest is unrepresented the court will not appoint a person to represent that interest. (*Gibson v. Wills*; *Headden v. Emmott*; and *Bruiton v. Birch*; all cited *supra*.)

When the cause has been ordered to stand over for amendment for want of parties, by adding them or their representative, and one of them having died in the meantime without leaving one, an application to proceed in the absence of a representative of the party deceased was refused with costs. (*Williams v. Page*, 27 Beav. 373.)

Under this order the court will not appoint a person to receive money out of court payable to a deceased person, even though the amount be small. (*Rawlins v. McMahon*, 1 Drew. 225).

(i) The proper person to be appointed under this order is the person who would be appointed administrator *ad litem*. (*Dean of Ely v. Gayford*, *supra*.)

Reference may also be made to *Sutherland v. DeVienne*; *Hewetson v. Todhunter*; *Ashmall v. Wood*; all cited *supra*; and *Hele v. Lord Bexley*, 15 Beav. 340.

No appointment can however be made without the consent of the person sought to be appointed. (*Hill v. Bonner*, 26 Beav. 372; 7 W. R. 81; *The Prince of Wales, &c., Company v. Palmer*, 25 Beav. 605; and *Vacy v. Vacy*, 1 L. T. N. S. 267.)

(k) As to the form of the order to be made on an application under this order, see *Hele v. Lord Bexley*, *supra*; *Whittington v. Gooding*, 10 Hare App. xxix.)

The application can be made *ex parte*, but notice should be given, before the order is drawn up, to the persons entitled to administer. (*Davies v. Boulcott*, *supra*.)

The order may be and is usually made at the hearing. (*Hewetson v. Todhunter*, *supra*; and in *Chaffers v. Headlam*, *supra*, it was made on motion on notice to all parties.

Suits not to be dismissed for the misjoinder of the plaintiffs.

MISJOINDER OF PLAINTIFFS.

XXXI. No suit is to be dismissed by reason only of the misjoinder (*l*) of persons as plaintiffs therein; (*m*) but whenever it appears to the court that, notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the court may grant such relief, and may modify its decree according to the special circumstances of the case, and for that purpose is to direct such amendments, if any, as may be necessary; and at the hearing, before such amendments are made, may treat any one or more of the plaintiffs as if he or they were defendant or defendants in the suit, and the remaining or other plaintiffs was or were the only plaintiff or plaintiffs on the record; and where there is a misjoinder of plaintiffs, and the plaintiff who has an interest has died, leaving a plaintiff on the record without any interest, the court may, at the hearing of the cause, order such an amendment of the record as may appear just, and proceed to a decision of the cause, if it shall see fit; and give such directions as to costs or otherwise, as may appear just and expedient.

(*l*) English act, 15 & 16 Vic., ch. 86, sec. 49.

As to misjoinder, see Mitford on Pleading 5th edit. 399, 401. The rule of pleading as to misjoinder remains. But misjoinder would not be a good cause of demurrer, for the court can order the wrongly joined plaintiff to be treated as a defendant, and therefore the *ground* of demurrer would fail. (Drew. Eq. Pleader, 48.)

(*m*) This order applies to a plaintiff suing on behalf of himself and others. (Clements v. Bowes, 1 Drew. 684, 694; 22 L. J. Ch. 1022; 1 W. R. 442; Beeching v. Lloyd, 3 Drew. 227; Evans v. Coventry, 3 Drew. 75; on appeal, 5 DeG. M. & G. 911, 918; Stupart v. Arrowsmith, 3 Sm. & G. 176; 2 Jur. N. S. 153.) This order is imperative. (Clements v. Bowes, *supra*; and see also Barton v. Barton, 3 K. & J. 512.) Where the suit is by a plaintiff filling two characters, see Carter v. Sanders, 28 L. J. Ch. 679; and where by husband and wife, Hope v. Fox, 1 J. & H. 456; 9 W. R. 360; 7 Jur. N. S. 186. This latter case was a suit to set aside an invalid

appointment held that the wife s

XXX equity of redemption possession order for the case

(n) See C

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In any suit entitled to the may be ordered, foreclosure,

This new order ing the application previously to 48, that an application order of foreclosure clear intention together with

An application motion must be served, and per v. Labadie, Gr delivering possession was held, per This section on in a suit for sp

SEC. 2.— equity of redemption court, upon subsequent interest person claiming a sale of such equity of redemption think fit to direct previously determined

FORECLOSURE OR REDEMPTION.
[ORDER XXXII., SEC. I. AND II.]

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appointment by a married woman, under a power vested in her alone, and it was held that it should not be instituted by the husband and wife as co-plaintiffs, but by the wife suing by next friend. Refer also to the authorities cited in this case.

SUITS FOR FORECLOSURE OR REDEMPTION.

XXXII. (n) In any suit for the foreclosure of the equity of redemption in any mortgaged property, or for redemption, the mortgagor may be ordered to deliver up possession of the mortgaged premises upon the final order for foreclosure, or for the dismissal of the bill, as the case may be.

Mortgagor may be ordered to deliver possession of the mortgaged premises after final order for foreclosure or dismissal.

(n) See Orders of 29th June, 1861, which contain the following order:

"DELIVERY OF POSSESSION AFTER FINAL FORECLOSURE.

In any suit for foreclosure or for redemption, the mortgagor, or other person entitled to the equity of redemption, being in possession of the premises foreclosed, may be ordered to deliver up possession of the same upon or after final order of foreclosure, or for the dismissal of the bill, as the case may be."

This new order provides for an apparent omission in the Orders of 1853, by extending the application of the latter "after final order of foreclosure." The court had, previously to 1861, declared in *Lazier v. Ranney*, 6 Grant's Chan. R. 323, 4 U. C. L. J. 48, that an application made under Order XXXII. of the Orders of 1853, after the final order of foreclosure had been made and acted upon by the plaintiff, was "within the clear intention and spirit of the order," and held that the plaintiff was entitled to it, together with his costs of the application.

An application under these orders cannot be made *ex parte*. Notice of the intended motion must be served, and an order drawn up thereon which must also be properly served, and possession must be demanded. This practice was confirmed in *Nevieux v. Labadie*, Grant's Cham. R. 13, where in moving to commit for a contempt in not delivering possession in obedience to an order made in pursuance of this section, it was held, per *Eaton*, V. C., that it must be shewn that the possession was demanded. This section only applies to mortgage cases, and possession cannot be given under it, in a suit for specific performance. (*Mavety v. Montgomery*, Grant's Cham. R. 21.)

SEC. 2.—(o) In any suit for the foreclosure of the equity of redemption in any mortgaged property, the court, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, (p) may direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct, (q) and, if the court so think fit, without previously determining the priorities of incumbrancers,

In foreclosure suits, court may direct a sale of the mortgaged premises.

either immediately and before determining the priorities, or after the usual time to redeem;

but a sum must be deposited in court, unless the mortgagee consent to the sale.

or giving the usual or any time to redeem; (r) but if such request be made by any such subsequent incumbrancer, or by the mortgagee, or by any person claiming under them respectively, the court is not to direct any such sale without the consent of the mortgagee, or the persons claiming under him, unless the party making such request deposit in court a reasonable sum of money, (s) to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose.

(o) English act, 15 and 16 Vic., ch. 86, sec. 8.

The discretion given to the court by this section is intended to be exercised for the advantage of all parties. The court will not act under it when such a course would be an act of oppression towards the mortgagor. (*Hurst v. Hurst*, 16 Bea. 375.) And see also *Robert v. Price*, 1 W. R. 303, and *Hiorns v. Holton*, 16 Jur. 1077, as to the course the court will pursue when the mortgagor dissents. In a foreclosure suit against an infant, the court—it being clearly for his benefit—ordered an immediate sale. (*Mears v. Best*, 10 Hare, App. li.; *Wigham v. Measor*, 5 W. R. 394; *Siffken v. Davis*, Kay App. xxi.) And where it is considered beneficial to the interests of an infant defendant, the court will direct a sale instead of a foreclosure, without requiring any deposit to cover the expenses of such sale. (*Bank of Upper Canada v. Scott*, 6 Grant's Ch. R. 451.)

The principles on which the court acts in directing a sale of a mortgaged estate are fully laid down in *Hurst v. Hurst*, 16 Bea. 372; *Smith v. Robinson*, 1 Sm. & G. 140; *Laslett v. Cliffe*, 2 Sm. & G. 278; *Wickham v. Nicholson*, 19 Bea. 38.

(p) As to the manner in which the court will exercise its discretion under this section when some of the incumbrancers object, see *Wickham v. Nicholson*, 19 Bea. 38; *Messerv. Boyle*, 21 Bea. 559; *Jones v. Bailey*, 17 Bea. 582; *Footner v. Sturgis*, 5 DeG. & Sm. 736; *Tuckley v. Thompson*, 1 J. & H. 126; *Bethune v. Caulcutt*, 1 Grant's Ch. R. 81; and where some of the parties interested are not before the court a sale cannot be decreed. (*Ibid.*) It was said that there can be no sale of mortgaged property, except subject to the mortgage, without the consent of the mortgagee. (*Wickenden v. Rayson*, 6 DeG. M. & G. 210; 25 L. J. Ch. 162; 26 L. T. 192.) But see *Whitfield or Whitbread v. Roberts*, 5 Jur. N.S. 113; 7 W. R. 216; 28 L. J. Ch. 234; 33 L. T. 24. And as to conduct of sale, see *Hewitt v. Nanson*, 28 L. J. Ch. 49; 7 W. R. 5.

In *Meyers v. Harrison*, 1 Grant's Ch. R. 449, it was held that a mortgagee was entitled to a decree for a sale or foreclosure at his option as against the mortgagor.

(q) Where infant defendants are interested see *Bank of Upper Canada v. Scott*, *supra*. The court will not direct a sale in the first instance, but fix a day for payment, and in default, direct a sale. (*Smith v. Robinson*, 1 Sm. & G. 140; 22 L. J. Ch. 482; *Lloyd v. Whittey*, 17 Jur. 754; 22 L. J. Ch. 1038.) But otherwise if all parties consent. (*Anning v. Lavers*, 1 W. R. 19.)

(r) The mortgagor is to induce the sale of the special ground furtherance of 4 Grant's Ch. R. in *Staines*, place in a 10 W. R.

The court in *Wayn v.* be directed to apply 2 Sm. & G. tained, the the decree.

(s) The 14 days from amount be will be for

See also follows: "shall be comm same shall posit, if the

But the O instead of a usual deposit was to enable the plaintiff, Walker, 8 Gr

Where, at for, and was event of the petition settling had proved ab due within on v. Richmond, alternative for tiff, make a de cover the claim Chan. R. 391.

Where, how cause must be that, too, altho Grant's Chan.

The rule that of one, unless incumbrancer.

Where a mort

(r) The usual time is six months. (*Lloyd v. Whitty, supra.*) *Prima facie* a mortgagor is entitled to six months to pay the amount of the mortgage money; and to induce the court to exercise the discretion vested under this order in it, some special ground must be shewn, and evidence offered that the court would be acting in furtherance of justice in restricting the rights of the mortgagor. (*Rigney v. Fuller, 4 Grant's Chan. R. 198.*) When a sale was manifestly for the benefit of all parties, in *Staines v. Rudlin, 9 Hare, App. liii., 16 Jur. 965*, the court ordered it to take place in a month; and in *Wigham v. Measor, 5 W. R. 394, Marriott v. Kirkham, 10 W. R. 340*, an immediate sale was ordered.

The court will not, under this section, order a sale on an interlocutory application. (*Wyn v. Lewis, 1 Drew. 487; 22 L. J. Ch. 1051; 1 W. R. 344.*) Nor will a sale be directed after a decree for foreclosure has been made, (*Ibid.*) even if the mortgagee applies. (*Girdlestone v. Lavender, 9 Hare, App. liii.*) But see *Laslett v. Cliffe, 2 Sm. & G. 278*; where a sale was directed after a decree for foreclosure had been obtained, the application being at the instance of the plaintiff having the carriage of the decree. Had it been otherwise see *Campbell v. Moxhay, 18 Jur. 641*.

(s) The amount required to be deposited is £20. The party asking the sale has 14 days from the day of hearing within which to place the deposit in court. If the amount be deposited within the time limited the decree for sale will go, otherwise it will be for foreclosure.

See also Orders promulgated on the 29th June, 1861, as to "conduct of sale," as follows: "Where, upon a bill for foreclosure, a sale is asked for by a defendant, it shall be competent to the court to require as a condition that the party asking the same shall conduct the sale at his own expense, dispensing in such case with a deposit, if the court shall think fit."

But the Order of June, 1861, does not entitle the defendant to insist upon a sale instead of a foreclosure, against the consent of the mortgagee, without paying in the usual deposit upon his undertaking the conduct of the sale. The object of the order was to enable the court to grant the defendant that indulgence, upon the consent of the plaintiff, in cases where the plaintiff desired to bid at the sale. (*Taylor v. Walker, 8 Grant's Ch. R. 506.*)

Where, at the hearing of a cause, a sale instead of a foreclosure had been asked for, and was directed by the decree, which omitted, however, to provide that in the event of the sale failing the defendant would stand foreclosed, the court, upon petition setting forth the facts, and that the attempts at sale which had been made had proved abortive, ordered the defendant to pay the amount which had been found due within one month, or, in default, foreclosure. (*Goodall v. Burrows, Henderson v. Richmond, 7 Grant's Chan. R. 449.*) And where the prayer of the bill is in the alternative for either sale or foreclosure, the court will, at the instance of the plaintiff, make a decree for sale, and in the event of a sale failing to produce sufficient to cover the claim of the plaintiff, order foreclosure. (*Blachford v. Oliver, 8 Grant's Chan. R. 391.*)

Where, however, a decree is sought to be changed from a sale to foreclosure, the cause must be set down to be re-heard, and notice served upon the defendant, and that, too, although the bill had been taken *pro confesso*. (*McClelan v. Jacobs, 9 Grant's Chan. R. 60.*)

The rule that a mortgagee of several estates may refuse to be redeemed in respect of one, unless redeemed on both, does not apply where a sale is asked by a prior incumbrancer. (*Merriitt v. Stephenson, 6 Grant, 667; 7 Grant, 22.*)

Where a mortgagor had conveyed the equity of redemption to a trustee under a

FORECLOSURE OR REDEMPTION.

[ORDER XXII., SEC. III., IV., AND V.]

marriage settlement, and the trustee asked a sale on further directions, it was held that he could only have it on the usual terms of paying in the deposit, and in default thereof a foreclosure. (*Machell v. Campbell*, 8 U.C. L. J. 117; see also *Whitfield v. Roberts*, 6 Jur. N. S. 118.)

SEC. 3.—Instead of foreclosure, the bill in any such suit may pray a sale of the mortgaged premises, and that any balance of the mortgage debt which may remain due after such sale may be paid by the mortgagor, and the same may be decreed accordingly. (t)

In case of sale, mortgagor may be ordered to pay any balance of the mortgage debt.

(t) Where the mortgagor has assigned his equity of redemption the order for the payment of the balance of the mortgage debt must be made against him and not against the assignee, and for that purpose the mortgagor must be a party to the suit. (*Turnbull v. Symmonds*, 6 Grant, 615.)

A surety of the mortgagor may be made a party, and ordered to pay any balance which may remain due after sale.

SEC. 4.—When any person is surety for the payment of a mortgage debt, such person may be made a party to any suit for the foreclosure of the equity of redemption of the mortgaged property, and the relief specified in the last section may be prayed against both the mortgagor and his surety, and the same may be decreed accordingly. (u)

(u) On a transfer of a mortgage, the mortgagee covenanted that if default were made in payment of the mortgage money, he would pay the same. *Held*, that this did not constitute him a surety within the meaning of this section. (*Clarke v. Best*, 8 Grant's Ch. R. 7.)

Where the mortgagee's debt is payable by instalments, and some only have fallen due, the bill may be dismissed, before decree, on payment of the amount due, interest and costs;

SEC. 5.—When a suit has been instituted for the foreclosure of the equity of redemption in any mortgaged property for default in the payment of interest, or of an instalment of the principal, any defendant may move to dismiss such bill upon paying into court the amount then due for principal and interest, with costs. (v)

(v) Upon default in payment by a mortgagor of any instalment of, or of interest upon mortgage money, the mortgagee has a right to call in the whole amount secured by the mortgage. (*Cameron v. McRae*, *Sparks v. Redhead*, 3 Grant's Ch. R. 311.)

A motion hereunder payable by instalment and computed up to the last gale day of 6 Grant's Ch.

It would be sufficient authority of the state to pay which will be granted.

Where default there is the order of interest not arrived, Jo. & Lat. 5.

The relief or his assignee Grant, 550.)

SEC. 6.—pose and in the suit, sure, upon principal and

When an under this section by order of payment of of the interest

(w) After payment it is irregular to falls due. (Cameron v. Redhead, 3 Grant's Ch. R. 311.)

Where there is and numerous other refused a motion

FORECLOSURE OR REDEMPTION.

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A motion under this section can only be made *before* decree. As to the practice hereunder it has been held that when a bill is filed for the foreclosure of a mortgage payable by instalments, and the defendant moves to dismiss on payment of the instalment and interest then due; the interest upon the mortgage money is only to be computed up to the day named for payment in the mortgage (the interest due on the last gale day) and not to the time of making the application. (*Strachan v. Murney*, 6 Grant's Ch. R. 378; 4 U. C. L. J. 42.)

It would seem to be proper practice that on producing an affidavit of tender of a sufficient sum to cover the amount due and the costs then incurred, and a certificate of the state of the cause, an order can be obtained to tax the plaintiff's costs, upon paying which, together with the amount due on the mortgage, into court, an order will be granted to dismiss the bill.

Where default is made in payment of interest on a mortgage of leaseholds, and there is the usual proviso for redemption on payment of principal on a given day, and of interest in the meantime, although the day for payment of the principal has not arrived, the mortgagee may file a bill to foreclose. (*Burrowes v. Molloy*, 2 Jo. & Lat. 621.)

The relief granted to a mortgagor under this section, will also be granted to him or his assignees on a bill filed on his or their own behalf. (*Moore v. Merritt*, 6 Grant, 550.)

SEC. 6.—When a suit has been instituted for the purpose and under the circumstances specified in the last section, any defendant may move to stay the proceedings in the suit, *after decree*, but before sale or final foreclosure, upon paying into court the amount then due for principal and interest, with costs.

When an application is made to stay the proceedings under this section, the decree may afterwards be enforced, by order of court, upon any subsequent default in the payment of any further instalment of the principal, or of the interest. (w)

(w) After payment of what is payable upon a mortgage, pursuant to this section, it is irregular to take any further proceeding in the cause until another instalment falls due. (*Carroll v. Hopkins*, 4 Grant's Chan. R. 431.) And where a decree of foreclosure obtained upon a mortgage payable by instalments, has been stayed upon payment of the amount actually due, and a subsequent default occurs, the proper order to make is to direct the whole sum secured to be paid by a certain day, with liberty to the defendant to pay the sum actually due, and stay proceedings thereon. (*Strachan v. Devlin*, Grant's Cham. R. 8.)

Where there was a suit by a first mortgagee (in possession) against the mortgagor and numerous other mortgagees, the court, having regard to the rights of all parties, refused a motion by the second mortgagee, that, on payment of the plaintiff's prin-

principal, interest, and costs, the estate might be conveyed to him and all proceedings stayed; but directed enquiries as to the priorities and incumbrances of the parties. (*Paine v. Edwards*, 8 Jur. N. S. 1200; 10 W. R. 709; 6 L. T. N. S. 600.) On the application, *Paynter v. Carew*, Kay. App. xxxviii., was relied upon.

When a foreclosure suit is set down to be heard upon an order to take the bill *pro confesso*, the plaintiff upon production of the affidavit specified in this order, may have a decree without a reference to the master.

SEC. 7. (x)—When the cause is heard upon an order to take the bill *pro confesso*, in a suit for the foreclosure of the equity of redemption in any mortgage property, the plaintiff is to produce at the hearing—

- (1.) The mortgage deed, and the assignments thereof, if any.
- (2.) An affidavit which is to state the amount advanced upon the security,—the amount paid, whether by receipt of rents or otherwise,—and the amount remaining due for principal and interest, distinguishing how much for principal and how much for interest. The affidavit is to state whether the mortgaged premises, or any part of them, has been in the occupation of the mortgagee or of any one under whom he claims; and, when there has been any such occupation, the affidavit is to state its nature,—the time it continued,—and the fair rentable value of the property.

Upon production of such proofs and documents, the court may at once determine the amount due; and when a foreclosure is ordered, the time and place for the payment of the mortgage money may be fixed by the decree, without a reference to the master, or any further enquiry.

(x) This section is in effect abrogated and repealed by the Orders of court promulgated on the 10th day of January, 1863. It provided that when a foreclosure suit is set down to be heard, upon an order to take the bill *pro confesso*, (which practice in such suits is now abolished,) the plaintiff, upon production of the affidavit specified in this order, might have a decree without a reference to the Master.

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IV. When on production and upon present pra under an or the following Osgoode Ha the office of four weeks diction, with answer or d decree or or upon you pe ceedings in

"NOTE.— county of Y the bill is a above plain such notice t now due by y liable to be c decree to be months from be foreclosed answering, y yourself or y the plaintiff i settling the a This order is

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FORECLOSURE OR REDEMPTION.

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The 4th Order of the Orders of the 10th day of January, 1868, provides as follows:

"DECREES FOR REDEMPTION OR FORECLOSURE OF MORTGAGES, OR FOR SALE.

IV. When the time for answering in either of the above classes of cases has elapsed, on production to the Registrar of the court, of the affidavit of the service of the bill, and upon præcipe, the plaintiff is to be entitled to such a decree as would, under the present practice, be made by the court upon a hearing of a cause, *pro confesso*, under an order obtained for that purpose; and on every such bill is to be endorsed the following notice:—"Your answer is to be filed at the office of the Registrar, at Osgoode Hall, in the city of Toronto, (or when the bill is filed in an outer county, at the office of the Deputy-Registrar at ———.) You are to answer or demur within four weeks from the service hereof, (or when the defendant is served out of the jurisdiction, within the time limited by the order authorising the service.) If you fail to answer or demur within the time above limited, you are to be subject to have a decree or order made against you, forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.

"NOTE.—This bill is filed by Messrs. A. B. & C. D., of the city of Toronto, in the county of York, solicitor, for above named plaintiff, (and when the party who files the bill is agent, add, agents of Messrs. E. F. and G. H., of ———, solicitors for the above plaintiff.)" And upon bills for foreclosure or sale is to be added to such notice the following: "And take notice that the plaintiff claims that there is now due by you for principal money and interest, the sum of £——, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the decree, your interest in the property may be foreclosed (or sold) unless before the time allowed you as by this notice for answering, you file in the office above named a memorandum in writing, signed by yourself or your solicitor, to the following effect: 'I dispute the amount claimed by the plaintiff in the cause'—in which case you will be notified of the time fixed for settling the amount due by you at least four days before the time to be so fixed." This order is not to affect any suit now pending."

Except in cases of suits now pending, the last mentioned order entirely suspends the operation of this section of Order XXXII. of the Orders 1858.

This section (7) applied to cases only where the account was taken by the court, and the amount found due for principal, interest, and costs was ascertained and embodied in the decree, and a time fixed for payment thereby. The practitioner availed himself of this section, where he had ascertained that a reference to the Master as to incumbrancers was unnecessary—the expense of such reference was thereby avoided—the account taken by the court at the hearing on production of an affidavit in terms of this section and the mortgage and assignments (if any) serving every purpose. Where a reference was taken, it was unnecessary to produce any such evidence to the court.

Where a plaintiff in suits for foreclosure or sale asks a reference to the master to enquire as to other incumbrancers, he takes such reference at the peril of costs, if there are in reality no other incumbrancers on the estate. (*Hamilton v. Howard, Burnside v. Lund, 4 Grant's Chan. R. 581.*) Where an account had to be taken under this section before the decree was drawn up and the defendant (mortgagor) died before the account was taken, a motion to take the account notwithstanding the death, on the ground that the bill was *pro confesso*, and that the decree would bear date prior to the death, was refused. (*Galbraith v. Armstrong, Grant's Cham. Rep. 83.*)

Where a sale is ordered in a foreclosure suit heard upon an order to take the bill *pro confesso*, the judge or master is to give directions for bringing in incumbrancers, and the sale is to proceed in other respects as in ordinary cases.

Where a sale is ordered, the judge at chambers, or the master acting in the matter, as the case may be, is to give such directions as he may think right for bringing in other incumbrancers; and the matter is to proceed in other respects as in ordinary cases when a sale has been ordered. (y)

(y) The practitioner will observe that where a decree for foreclosure is taken, the incumbrancers to be made parties are those subsequent in point of registration or otherwise to the plaintiff's mortgage; but where the decree is for a sale, all incumbrancers, except prior mortgagees, must be brought before the court, and provision therefor must be inserted in the decree, otherwise there would be difficulty in working out the decree at the subsequent stages of the cause, as for instance in shewing a good title to a purchaser under the sale.

Where a suit for foreclosure is brought to a hearing in the ordinary way, the account is to be taken at chambers, or before a master, not at the hearing.

SEC. 8.—Where a suit for the foreclosure of the equity of redemption of any mortgaged property has been brought to a hearing in the ordinary way, neither the amount of the mortgage debt, nor the time and place of payment, are to be determined at the hearing, but the case is to be adjourned to chambers, or a reference to the master directed, as may be thought most convenient. (z)

(z) With regard to the practice as to "*suits for foreclosure or redemption*," the Orders promulgated on the 6th of February, 1858, regulate "*the proceedings in suits for foreclosure or sale*," and it has been considered judicious to refer to these orders under this section. They are as follow:

"PROCEEDINGS IN SUITS FOR FORECLOSURE OR SALE.

"In suits instituted by mortgagees or judgment creditors for sale or foreclosure, "when all incumbrancers have not been made parties, or further enquiries are sought, the complainant is to bring in to the Master's office, together with the "decree, a certificate from the Registrar of the county wherein the lands lie, setting "forth all the registered incumbrances which affect the property in the pleadings "mentioned, and such other evidence as he may be advised; and upon his *ex parte* "application for that purpose the Master is to direct all such persons as appear to "him to have any lien, charge, or incumbrance upon the estate in question, to be "made parties to the cause. (a)

(a) Subsequent incumbrancers should not be made parties by bill, but, under this

order, be made parties by bill, and the court will

The owner should be made a party of the equity of the equity in *Prinney v. Prinney*. The court prom

"PART

In any case interested in the Master's office shall be considered so interested that the court shall be interested in the

Where uncosts of making Brooks, Grant, and Brancer are *shaw v. Park*. The court asks for a reference at the estate. (H)

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"When the prior mortgage of the cause subject to a originally o

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(b) By the follows:

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The office of or Deputy-Reg Cham. 6.)

"When a reference in any case p determine, is

SUITS FOR FORECLOSURE OR SALE.
[ORDER XXXII., AND ORDERS 6TH FEBRUARY, 1859.]

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order, be made parties in the Master's office. If they are made parties by bill the court will not allow any costs in respect of so making them parties.

The owners of the equity of redemption must be made parties to the bill, and should be so made before decree. The Master has not the power to make the owners of the equity of redemption parties to the suit in his office. (*Whan v. Lucas*; *Murphy v. Pringle*; ——— *v. Courtney*, Grant's Chamber R. 58.) But by the Orders of court promulgated on the 29th of June, 1861, it is provided as follows:

"PARTIES INTERESTED IN THE EQUITY OF REDEMPTION MADE
PARTIES IN THE MASTER'S OFFICE.

In any case in which it shall appear conducive to the ends of justice, that parties interested in the equity of redemption should be allowed to be made parties in the Master's office, by reason of the parties so interested being numerous or otherwise, it shall be competent to the court, at the hearing, or afterwards, to direct that parties so interested may be made parties in the Master's office, upon such terms as to the court shall seem fit; such order to be only made where one or more parties interested in the equity of redemption are already before the court."

Where unnecessary parties are made, final order will not be granted, until the costs of making them are deducted, and a new day appointed for payment. (*Rice v. Brooks*, Grant's Chamber R. 71.) The real representatives of a subsequent incumbrancer are unnecessary parties. (*Taylor v. Stead*, Grant's Chamber R. 74; *Grimshawe v. Parks*, 6 U. C. L. J. 142.) Where a plaintiff in suits for foreclosure or sale asks for a reference to the Master to enquire as to other incumbrancers, he takes such reference at the peril of costs, if there are in reality no other incumbrancers on the estate. (*Hamilton v. Howard*; *Burnside v. Lund*, 4 Grant's Chan. R. 581.)

Where a person, made a party in the Master's office, appears and disclaims, he will not be allowed any costs, as he would effect the same object by staying away. (*Hatt v. Park*, 6 Grant, 553.)

"When the bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause. But when the plaintiff in any such cause prays a sale or foreclosure, subject to a prior mortgage, such mortgagee is not to be made a party either originally or in the Master's office."

"Upon the office copy of the decree to be served upon persons made parties in the Master's office, under the provisions of this order, there must be endorsed a notice to the effect set forth in schedule A. to these orders annexed." (b)

(b) By the Order promulgated on the 5th of October, 1859, it is provided as follows:

"That all office copies of decrees to be served on parties, added in the Master's office, may be certified by the Deputy-Registrar where the reference is made to."

The office copy decree must be duly authenticated by the stamp of the Registrar or Deputy-Registrar when served. (*Elliott v. Helliwell*; *Feehan v. Hayes*, Grant's Cham. 6.)

"When a reference has been directed as to incumbrances, or to settle priorities, in any case provided for by this order, the Master, before he proceeds to hear and determine, is to require an appointment to the effect set forth in schedule B. to this

"order annexed, to be served upon all persons made parties before the hearing, "whether the bill has been taken *pro confesso* against such persons or not." (c)

(c) It is not necessary to serve the mortgagee with schedule B. (*Baby v. Woodbridge*; *Murney v. McLellan*, 5 U. C. L. J. 67.) It would also seem improper to serve it on any owner or part owner of the equity of redemption, as such person could not be foreclosed by merely failing to attend thereon, but would be entitled to the usual six months to redeem, notwithstanding such non-attendance.

"When any person who has been duly served with an office copy of the decree, or with an appointment under the provisions of this order, neglects to attend at the time appointed, the Master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the court order otherwise, upon application duly made for that purpose."

"The Master's report in the cases specified in this order, must state the names of all persons who have been made parties in his office, and of those who have been served with the appointment hereinbefore provided. The names of such as have made default, having been duly served, must then be stated; and then the report must go on to settle the priorities, &c., of such as have attended, and these latter are to be certified as the only incumbrancers upon the estate;" (d)

(d) The practice as to the payment of the mortgage money is regulated by the Orders promulgated on the 29th day of June, 1861. The Order as to "the payment of mortgage money," is as follows:

"PAYMENT OF MORTGAGE MONEY.

Where the Master is directed to appoint mortgage money to be paid at some time and place, he is to appoint the same to be paid into some bank at its head office, or at some branch or agency office of such bank, to the joint credit of the party to whom the same is made payable, and of the registrar of this court; the party to whom the same is made payable to name the bank into which he desires the same to be paid, and the Master to name the place for such payment.

Where money is paid into some bank, in pursuance of such appointment aforesaid, it shall be competent to the party paying in the same, to pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of such party and the Registrar. If the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of this court. Where default is made in the payment of money appointed under this order to be paid into any bank, the certificate of the cashier, where the same is made payable, or of other, the like bank officer, shall be sufficient evidence of such default. Where the affidavit of the party entitled to receive the same is by the present practice required, the like affidavit shall still be necessary."

Another Order promulgated on the same 29th of June, 1861, regulates the proceeding where state of the account is changed after decree or report. This Order is as follows:

"PROCEEDING WHERE STATE OF ACCOUNT CHANGED AFTER DECREE OR REPORT.

In cases where, after a decree or decretal order for the sale or foreclosure of mortgage property, the state of the account ascertained by decree, or decretal order, or by the report of the Master, shall be changed by payment of money, by receipt of

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rents and profits, by occupation rent, or otherwise, before final order for foreclosure or sale obtained, it shall be competent to the plaintiff or other party to whom the mortgage money is payable, to give notice to the party by whom the same is payable, that he gives him credit for a sum certain, to be named in such notice, and that he claims that there remains due to him in respect of such mortgage money a sum certain, to be also named in such notice; and in case, upon the final order for foreclosure or sale being applied for, the judge shall think the sums named in such notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the judge shall direct notice to be given; or it shall be competent to the party to whom the mortgage money is payable, to apply to a Judge in Chambers for a reference to a Master, or for an appointment to fix such sums respectively, and in the latter case either upon notice, or *ex parte*, as the judge may think fit, and the order to be made thereupon is to be served, or service thereof dispensed with, as the judge may direct.

It shall be competent to the party to whom such notice may be given to apply to a Judge in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid instead of the amounts mentioned in such notice; or for a reference to a Master for the like purpose; and in case the judge shall think a reference to a Master proper, the same may be made *ex parte*, unless the judge shall otherwise direct."

"Where a mortgagee has proceeded at law upon his security, he shall not be entitled to his costs in equity, unless the court, under the circumstances, shall see fit to order otherwise." (e)

(e) This order is merely made for the purpose of preventing unnecessary and harassing proceedings against mortgagors and not for the purpose of preventing a prudent or reasonable exercise by the mortgagee of his right to sue at law and in equity. So where a mortgagee brings a suit in good faith the court will not enter too nicely into the question of the necessity or propriety of the action. The main question is, whether the suit at law is in *bona fide*, or for the purpose of making costs. (Dallas v. Gow, Grant's Cham. 65; 5 U. C. L. J. 280.) So where the plaintiff in equity brought an ejectment suit, for the purpose of preserving the property, he was allowed his costs in both suits. (*Ibid*.)

SCHEDULE A.

Whereas a suit has been instituted by the within named complainant for the foreclosure (or as the case may be) of certain lands, being the west half of lot No. 19, in the second concession of the township of Toronto, (or some other sufficient description of the property,) (a) and I have been directed to enquire whether any person other than the plaintiff, has any charge, lien, or incumbrance upon the said estate; and whereas it has been made to appear before me that you have some lien, charge, or incumbrance upon the said estate, and I have therefore caused you to be made a party to this suit, and appointed the _____ day of _____ for you to appear before me, either in person or by your solicitor, to prove your claims.

Now, you are hereby required to take notice:

1st. That if you wish to apply to discharge my order making you a party, or to add to or vary the within decree, you must do so within fourteen days from the service hereof; and if you fail to do so, you will be bound by the decree and the further proceedings in this cause as if you were originally made a party to the suit.

2nd. That if you fail to attend at my chambers at Osgoode Hall, in the city of

Toronto, (or as the case be,) at the time appointed, you will be treated as disclaiming all interest in the property in question, and it will be disposed of in the same way as if you had no claim thereon, and your claim will be in fact foreclosed by such non-attendance.

A. B., Master.

Note (a).—When the decree is for the sale of the debtor's lands generally at the suit of a judgment creditor, say for the sale of all the lands of (the debtor) within the county of York (or as the case may be.)

SCHEDULE B.
IN CHANCERY.

A. B., Plaintiff,
and
C. D., Defendant.

Having been directed by the decree in this cause to enquire whether any person other than the plaintiff has any lien, charge, or incumbrance upon the lands in the pleadings mentioned, being the west half of lot 10, in the 2nd concession of the township of York, (or some other plain description,) I do hereby appoint _____ day of _____, at my chambers at Osgoode Hall, in the city of Toronto, (or as the case may be,) to proceed with the said enquiries. And you are hereby required to take notice that if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

E. F., Master.

As to right to file bill to foreclose.—A mortgagee who holds several mortgages on the same land, one of which is not due, cannot file a bill to foreclose that one with the others. (Thibodo v. Collar, 1 Grant, 147.)

A mortgagee holding several mortgages on the same property can file a separate bill on each mortgage, but the court will, in such case, exercise its discretion as to costs. (Noble v. Line, 5 U. C. L. J. 163.)

The chartered banks of this province have a right to foreclose mortgages held by them as security. (B. U. C. v. Scott, 6 Grant, 451.)

Where a subsequent mortgagee files a bill, and the prior mortgagee afterwards files a bill on his mortgage, the subsequent mortgagee is entitled to his costs of the first suit, incurred prior to his being made a party in the second suit. (Allan v. McDougall, 6 U. C. L. J. 64; followed in Goodhue v. Whitmore, 7 U. C. L. J. 124.)

A person holding mortgages in trust for sale to indemnify him against loss on account of the mortgagor, is not entitled to foreclose in case of default; he is only entitled to a decree for sale, allowing the mortgagor the usual time to redeem. (Paton v. Wilkes, 8 Grant, 252.)

A mortgagee cannot file a bill to foreclose before his estate has become absolute at law by default in payment. (Bonham v. Newcomb, 2 Vent. 335.)

Parties to foreclosure suits.—Where a mortgagor becomes bankrupt, his assignees (and not he) are the proper parties to a foreclosure suit. (Torrance v. Vinterbotton, 2 Grant, 487.)

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So where a mortgagee assigns all his interest to a co-mortgagee he is an unnecessary party to a foreclosure suit by the co-mortgagee, either originally or in the Master's office; (*Russell v. Robertson*, 5 U. C. L. J. 118;) and that although such mortgagee has been in possession. (*Ibid.*)

Where, after a mortgage being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties in a suit to foreclose the mortgage. (*Buckley v. Wilson*, 8 Grant's Ch. R. 566.)

In a suit for foreclosure or sale the surviving trustee and executrix of the mortgagor, being also tenant for life of the property, sufficiently represents the persons interested in remainder. (*Marriott v. Kirkham*, 3 Giff. 586; 8 Jur. N. S. 379; 31 L. J. Ch. 312; 10 W. R. 240; 6 L. T. N. S. 17.) By a foreclosure decree on an equitable mortgage, the mortgagor was declared a trustee, and an order was made vesting the estate in the mortgagee. (*Lechmere v. Clamp*, 30 Bea. 218.)

See also as to parties to foreclosure suits, page 20 *supra*.

Form of decree of foreclosure.—Where there are several judgment creditors, the decree should give them successive rights of redemption although very short periods must be fixed for that purpose. (*Carroll v. Hopkins*, 4 Grant, 481.)

Where a foreclosure decree did not reserve a day to shew cause by an infant defendant, and the infant on attaining his majority applied to put in an answer and raise a fresh defence, the application was refused on the ground that on account of the frame of the decree the relief could not be obtained without a re-hearing. The decree should reserve a day to shew cause; (*Mair v. Kerr*, 2 Grant, 223;) see further as to the form of a decree of foreclosure against the infant heir of the mortgagor. (*Saunderson v. Caston*, 1 Grant, 349.)

A decree of foreclosure against the widow and devisee of a deceased mortgagor, should contain a declaration that on payment of the amount due, the widow should, if she chose, be let into dower. (*Thibodo v. Collar*, 1 Grant, 147.)

Where a decree of foreclosure had been drawn up without inserting a direction to enquire as to incumbrances, and it appeared that there were several judgment creditors, the decree was allowed to be amended on the payment of costs. (*Moffatt v. March*, 8 Grant, 168.)

Where portions of an estate under mortgage are conveyed away by the mortgagor, one day for payment of the amount will be given to all the persons interested in the equity of redemption. (*Hill v. Forsyth*, 7 Grant's Ch. R. 461.)

Where there were two rival claimants to the equity of redemption, and the mortgagee was ignorant which of them was really entitled, the court directed the usual redemption by, and conveyance to, the person *prima facie* entitled to the equity of redemption, with a right to the other claimant at any time before the day appointed for payment to shew himself entitled. (*Rumsey v. Thompson*, 8 Grant, 372.)

Form of decree for sale.—It is prudent to insert in a decree for a sale, that if the sale do not bring the amount due, or is abortive, that then there should be a foreclosure, otherwise the only remedy will be to sell on the usual terms for what the property will fetch by filing a petition to carry out the decree; (*Goodall v. Burrows*, 7 Grant, 449; 6 U. C. L. J. 189;) or to obtain an order on petition that the defendant do pay the amount within one month or in default foreclosure. (*Ibid.*, 7 Grant, 450.)

Time and place for payment of, and attendance to receive mortgage money.—Where

[ORDER XXXI., AND ORDERS 6TH FEBRUARY, 1858.]

a mortgagee attends to receive the mortgage money, his attendance so early as to allow a reasonable time for payment of the money before the end of the time named will be sufficient. (*Saunderson v. Caston*, 2 Grant, 488.) So where the attorney of the mortgagee attended during the last fifteen minutes of the two hours appointed, the attendance was held sufficient and the final order was granted. (*Mitchell v. Hayes*, Grant's Cham. 56; 5 U. C. L. J. 282.)

A mortgagee cannot be compelled to receive payment before the day fixed, though the full amount of principal and interest up to that day be tendered. (*Brown v. Cole*, 14 Sim. 427.)

The court will grant an order changing the place appointed for payment. (*Jones v. Bailey*, 1 Grant, 353.) In foreclosure suits the money should be paid into a bank, (see Order 29th June, 1861, *supra*.) and the foregoing cases are now only of importance where money, other than mortgage money, is directed to be paid by decree or order at a specified time and place.

Enlarging time for payment.—The time for payment of the mortgage money will be enlarged on the application of the mortgagor, if the property be an ample security and there is a probability of his being able to pay at the end of such enlarged time. The usual terms on which the order is granted are the payment of all arrears of interest and of costs, and the order contains a reference to a Master to compute subsequent interest and tax subsequent costs in case the parties differ. (*Ford v. Steeples*, 1 U. C. Jur. 1, p. 282.) In this case, the ground upon which the order was granted was that the mortgagor had effected a sale of the property for £50 more than the plaintiff's claim, and that he expected to receive the purchase money in full in two or three months, and the court enlarged the time for six months on the usual terms.

A proper case must be shewn and the security should be ample. (*Edwards v. Cunliffe*, 1 Madd. 287; *Ismoord v. Claypool*, 1 Ch. Rep. 262; *Holford v. Yate*, 1 K. & J. 677; *Anon*, Barn. 221; *Cocher v. Beirs*, 1 Ch. Ca. 61; *Ford v. Wastell*, 6 Hare, 229.)

Strong grounds need not be shewn, as the court is indulgent to mortgagors, but some reason should be assigned, otherwise the application will be refused. (*Nanny v. Edwards*, 4 Russ. 125.)

The security should be ample. (*Eyre v. Hanson*, 2 Beav. 479.)

The interest and costs will be required to be paid forthwith, even in case of infants. (*Coombe v. Stewart*, 18 Beav. 111.)

In *Finch v. Shaw*, 20 Beav. 555, an extension was granted pending an appeal to the House of Lords, the mortgagor being required however to pay the full amount due for principal, interest, and costs, and the costs of the application, into court; the mortgagee to receive the dividends of the money when invested on his undertaking to re-pay them should the decree be reversed.

Subsequent interest is to be computed on the principal sum only; (*Whatton v. Cradock*, 1 Keen, 269; *Brewin v. Austin*, 2 Keen, 211;) and see further as to granting extension of time and the terms on which it is granted, as to payment of interest and costs, and where default is made in such payment. (*Jones v. Creswicke*, 9 Sim. 304; *Geldard v. Hornby*, 1 Hare, 251; *Eyre v. Hanson*, 2 Beav. 478; *Edwards v. Cunliffe*, 1 Mad. 287; and see 2 Keen, 212; *Ellis v. Griffiths*, 7 Beav. 88.)

The order will, in all cases, proceed to foreclose the mortgagor upon non-payment at the appointed time of the sum, upon the conditional payment of which the order

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is made, (*Edwards v. Cunliffe*, 1 Mad. 287; *Eyre v. Hanson*, 2 Bea. 478;) and if the condition be not complied with, the order of foreclosure absolute may be made as of course, and its discharge has been refused with costs; (*Jones v. Roberts, McClell. & Y. 567*;) thought it was sworn to have been obtained by surprise and pending a treaty between the parties. But the order has been discharged, if the mortgagee, by his own act, (as by receiving rent,) vary the amount due between the date of the order, enlarging the time, or the Master's report made thereon, and of the order absolute. (*Ismoore v. Claypool*, 9 Sim. 317, *note*; *Nanfan v. Perkins*, 9 Sim. 308, *note*; *Crompton v. Earl of Effingham*, 9 Sim. 311, *note*; *Jones v. Creswicke*, 9 Sim. 304; *Ford v. Wastell*, 6 Hare, 229; 2 Ph. 591; *Lee v. Heath*, 9 Sim. 306, *note*.)

In opposing a motion to enlarge the time for payment of mortgage money found due by the Master's report, the mortgagee swore that in consequence of non-payment by the mortgagor, he had been obliged to raise money to meet liabilities of his own at a rate much beyond the rate payable under the mortgage; on granting the extension, the mortgagor was required to pay such a sum, in addition to the rate reserved by the mortgage, as would cover the interest payable by the mortgagee. (*Howard v. Macara*, Grant's Cham. R. 27; and see also *Smith v. Heron*, Grant's Cham. R. 28.)

An affidavit of the defendants' solicitor, stating his belief that the defendants had exerted themselves and were still endeavouring to raise the money, and that the property was worth much more than the debt, was held insufficient on which to obtain the order to enlarge the time. (*Anon*, 4 Grant, 61.)

The application for enlargement must be made in Chambers. (*Ibid*.)

Final order, foreclosure.—A mortgagee will not be entitled to a final order of foreclosure against the mortgagor or a subsequent mortgagee, unless he be in a position to reconvey the legal estate unincumbered. (*Ross v. Thompson*, 2 Grant, 624.)

Where a decree of foreclosure was erroneous, the final order was refused on default in payment at the time appointed. (*Commercial Bank v. Graham*, 4 Grant, 419.)

In a suit to foreclose a mortgage given to partners to secure a partnership debt a final order was granted though one of the co-partners had not executed the power of attorney to receive the mortgage money, or made any affidavit of non-payment, such co-partner being resident out of the jurisdiction and never having interfered with the mortgage transaction. (*Counter v. Wylde*, 1 Grant, 538.) Where, however, the plaintiff and defendant were both resident out of the jurisdiction in Great Britain, it was held that an affidavit of non-payment by the agent only was insufficient, as under such circumstances it was thought quite likely the defendant might have paid the plaintiff without the agent knowing any thing about it. (*McKechnie v. McKechnie*, Grant's Cham. 42.) In a suit of foreclosure by the executor and devisees of a deceased mortgagee, where the executor alone had attended at the time and place appointed, and it did not appear that the debts of the estate had been paid, the attendance was held sufficient and final order granted. (*Evans v. Parker*, 2 Grant, 555.) Where the mortgagee had become bankrupt, and he and his assignees filed a bill to foreclose, the final order was granted though one of the assignees, on account of his absence from the country, had not executed the power of attorney or made an affidavit of non-payment. (*Lyman v. Kirkpatrick*, 2 Grant, 625.)

Where the day appointed fell upon a Sunday, the final order was refused, though attendance had been made on the Saturday and Monday preceding and following. (*Holcumb v. Leach*, 3 Grant, 449.)

Where a mortgagor sought to set aside a final order of foreclosure on the ground that mesne incumbrancers had not been made parties, an application made by him for that purpose seven months after the date of the final order, was refused, as the

objection could and ought to have been made at the hearing, or in the Master's office. (*Cameron v. Lynes*, Grant's Cham. 42.)

Where after default in payment at the time and place appointed, the mortgagee receives any thing on account, the default is thereby waived and a final order will not be granted until a new account be taken and new day appointed.

Where, however, after default, the mortgagee merely enters into possession, it would seem that the default would not be waived, at any rate if the occupation rent be shewn to be less than the amount of interest accrued since the day appointed, so that the account would not be changed. (*Greenshields v. Blackwood*, Grant's Cham. 61.)

The local agents of the Bank of British North America cannot grant powers of attorney to third parties to receive money ordered to be paid to the bank in a foreclosure suit. (*B. B. N. A. v. Rattenbury*, Grant's Cham. 65.)

Where a defendant in a foreclosure suit was served with the Master's first warrant and absconded, and the subsequent warrants had been left at his place of residence within the jurisdiction, the final order was allowed to go on default in payment. (*White v. Courtney*, Grant's Cham. 66.)

If wife and husband join in a mortgage of the wife's property a decree and final order of foreclosure against both will foreclose the wife. (*Mallack v. Galton*, 8 P. W. 352.)

In a foreclosure suit against puisne mortgagees and the mortgagor, an order must be made foreclosing the former absolutely, before proceeding to foreclose the mortgagor. (*Whitbread v. Lyall*, 3 Sm. & G.; 20 Jur. 671; 27 L. T. 278.)

Final order for sale.—On moving for final order for sale, it is sufficient to shew that default was made in payment of the plaintiff's claim, and it need not be shewn that default was also made in payment of the claims of incumbrancers. (*Irvine v. Whitehead*, Grant's Cham. 10.)

Opening foreclosure.—A final order of foreclosure absolute drawn up and entered was set aside at the instance of a purchaser of the equity of redemption who had acquired his interest after the institution of the suit to foreclose, but who had no actual notice of the suit till some time after the final order was granted. (*Hilliard v. Campbell*, 7 Grant, 96.)

A foreclosure decree cannot be opened at the suit of a plaintiff, who admits part of the decree and impeaches the rest. (*Patch v. Ward*, 11 W. R. 185; 7 L. T. N. S. 413.)

The court will, in some cases, open the foreclosure even after the final order has been signed and enrolled. (*Thornhill v. Manning*, 1 Sim. N. S. 451.) See also *Burgh v. Langton*, 5 Bro. P. C. 213, Toml. Edit.; 2 Eq. Ca. Ab. 609; 15 Vin. Abr. 476, Pl. 2; where foreclosure was opened under peculiar circumstances after the mortgagee had been in possession for sixteen years.

If the mortgagee, after final order, proceed at law on the covenant, or on some collateral security, as a bond or promissory note, he thereby opens the foreclosure. (*Dashwood v. Blythway*, 1 Eq. Ca. Ab. 317; 15 Vin. Abr. 477, Pl. 3.)

If the decree of foreclosure has been obtained by fraud or collusion, the court will open the foreclosure. (*Lloyd v. Mansell*, 2 P. Wms. 73; *Gore v. Staupoole*, 1 Dow, 18; *Harvey v. Tebbutt*, 1 J. & W. 197.)

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But the court will not, for an error in a matter of form, open foreclosure after long possession, (*Jones v. Kenrick*, 5 Bro. P. C. 244, Toml. Ed.,) especially if the property has been improved or altered, or has been dealt with. (*Tooke v. Bishop of Ely*, and *Lant v. Crispo*, 5 Bro. P. C. Toml. Ed. 181, 200.)

The foreclosure may also be opened by the act of the mortgagee (*Cook v. Sadler*, 2 Vern. 235) if he sue the mortgagor on his covenant or bond, where the estate proves insufficient to satisfy the mortgage debt. The mortgagee has a general right to enforce all his remedies at the same time. If he proceeds by foreclosure first, and then finding his estate insufficient to satisfy the debt, he proceeds to sue at law on his covenant, he can only do so by opening the foreclosure and giving a new right of redemption to the mortgagor. If, however, he proceeds at law upon his covenant first, and obtains part payment of his debt, he may still foreclose for the residue. The principle is, that if the mortgagee takes his legal remedy first, the mortgagor retains his right to redeem, and the mortgagee electing to take the estate first, cannot be allowed to get both it and the debt.

There is authority for the proposition that if an incumbrancer, seeking to open a foreclosure and to redeem, on the ground that he was not a party to the suit, be in an obscure station and his means doubtful, he will be ordered to give security for costs in case he do not redeem. (*Bird v. Gandy*, 7 Vin. Abr. 45, Pl. 20; *Stevens v. Williams*, 1 Sim. N. S. 545.)

Power of sale.—The judgment creditors of a mortgagee have such an interest in the due exercise of a power of sale, that equity will grant them relief against such mortgagee exercising it to their disadvantage. (*Commercial Bank v. Watson*, 5 U. C. L. J. 163;) and *query*, whether the power can be exercised at all without their concurrence. (*Ibid.*)

Pending an appeal to the Court of Error and Appeal, in a suit to set aside a mortgage, a mortgagee was enjoined from exercising a power of sale contained in the mortgage; (*Commercial Bank v. Bank of Upper Canada*, Grant's Cham. 64;) and from proceedings to sale, under a decree for sale on a mortgage. (*Bank of Upper Canada v. Pottroff*, 8 U. C. L. J. 382.)

Redemption suits.—A suit for redemption which fails, cannot, under the prayer for general relief, be turned into a suit for an account. (*Patch v. Ward*, 11 W. R. 135; 7 L. T. N. S. 413.)

After a foreclosure decree absolute a mortgagor will not be allowed to redeem, although he alleges the decree was obtained by fraud; he must seek to have it set aside. (*Patch v. Ward*, 11 W. R. 135.)

REFERENCES TO THE MASTER.

XXXIII. In all cases where according to the present practice, a reference to the master would be directed the court may dispose of such matters itself, if it think fit, and may direct the proceedings to be taken in full court, or at chambers, as it may find expedient. (f)

Matters which would be referred to the master under the present practice may be determined by the court:

(f) The plaintiff has, *prima facie*, a right to have the reference directed to the Master resident in the county wherein the bill is filed. (*Macara v. Gwynne*, 3 Grant's Cham. R. 310.)



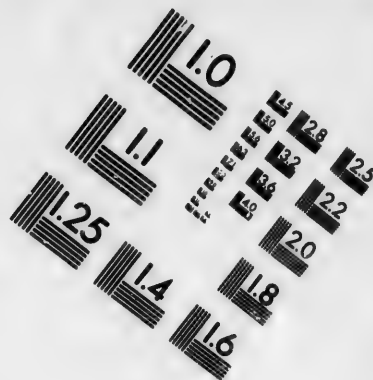
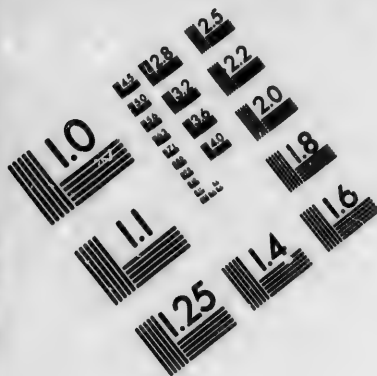
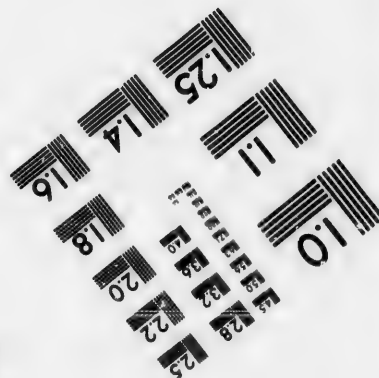
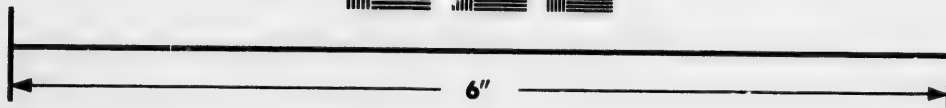
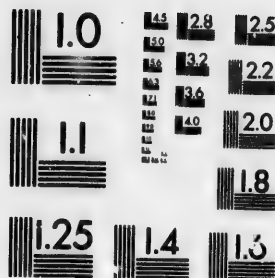


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SEC. 2.—The court may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, in such way as it may think fit, the better to enable it to determine any matter in evidence in any cause or proceeding, and may act on the certificate of such persons. (g)

(g) English act, 15 & 16 Vic., ch. 80, sec. 42.

As to the effect of the powers given by this section in extending the jurisdiction of equity, see *M'Intosh v. The Great Western Railway Company*, 3 Sm. & G. 146; *Mildmay v. Methuen*, 1 Drew, 216; 22 L. J. Ch. 297; 16 Jur. 965. As to the employment of accountants, (*Re London Birmingham and Bucks Railway Company*, 6 W. R. 141.) They need not always be employed in the presence of the parties. (*Ibid*). As to the employment of scientific persons to test documents, believed to have been forged, see *Groves v. Groves*, *May App.* xix; 23 L. J. Ch. 199; 2 W. R. 86.

JUDGES' CHAMBERS.—BUSINESS TO BE DESPATCHED THERE, AND MODE OF PROCEDURE.

XXXIV. In future one of the judges of the court

One of the judges will sit daily at chambers for the despatch of the following business, and of such other matters as the court from time to time shall think may be more conveniently disposed of in chambers than in full court, viz.: (h)

(h) English act, 15 & 16 Vic., ch. 80, sec. 11.

Sub-sections 2, 4, 5, 7, 8, 9, 10, of this Order, are contained in English act, 15 & 16 Vic., ch. 80, sec. 26.

(1.) For the sale of the estates of infants, under statute 12 Victoria, chapter 72.

(2.) As to the guardianship, maintenance and advancement of infants. (i)

(i) The proceedings may originate in chambers. (*Smith's Ch. P.* 558.) Evidence must be produced as to the age, fortune or property, and relations of the infant.

(3.) For the administration of estates under Order XV.

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- (4.) For time to answer or demur.
- (5.) For leave to amend bills.
- (6.) For changing the venue.
- (7.) To postpone the examination of witnesses, or to allow the production of further evidence.
- (8.) For the production of documents. (*k*)

(*k*) See *Sergison v. Livingstone*, 17 Jur. 33; 1 W. R. 109. English act, 15 & 16 Vic., ch. 86, sec 18, and notes, under the title "production of documents." In cases of great difficulty the consideration of the case has been adjourned into court. (*Thompson v. Teuton*, 9 Hare, App. xlix.)

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- (9.) Relating to the conduct of suits or matters. (*l*)

(*l*) The question who is to have the conduct of the proceedings will be determined in chambers, as well when they are carried on in two suits as in one. (*Stone v. Van Heythuysen*, 18 Jur. 844.)

- (10.) As to matters connected with the management of property.

SEC. 2.—A judge sitting at chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the court; (*m*) all orders made by a judge at chambers are to have the force and effect of orders of the court; (*n*) and all or any of the powers, authorities, and jurisdictions, given to the master of the court by any act or acts now in force, or by any general order or orders of the court, may be exercised by the judge sitting at chambers. (*o*)

(*m*) English act, 15 & 16 Vic., ch. 80, sec. 18—*Morgan's Chancery Acts and Orders*, 3rd edit., p. 140.

(*n*) English act, 15 & 16 Vic., ch. 80, sec. 15, *Morgan, ibid*, 141.

(*o*) English act, 15 & 16 Vic., ch. 80, sec. 86. English Order (consolidated) *ibid*. XXXV., Rule 61.

In *Moffatt v. Ruddle*, 4 Grant, 44, the court held, that whatever applications could under this order be made in chambers must be so made. And *In re Stuart*, 4 Grant, 44; a judge sitting in chambers granted an application *de lunatico inquirendo*, it being held that this order gave to a judge in chambers authority to act in such a matter. And also see *In re Paton*, 4 Grant, 147; where it was held that under this order a judge in chambers was authorised to grant a writ of *habeas corpus*.

The court refused to hear otherwise than in chambers a motion to enlarge the time appointed for payment of mortgage money. (*Anon.*, 4 Grant, 61.)

It would seem that an order which would in reality amount to a decree in the cause will not be granted in chambers even on consent, but must be obtained in court. (*Craig v. Craig*, Grant's Cham. 41.)

SEC. 3.—The court may adjourn for consideration in chambers any matter which in the opinion of the court may be disposed of more conveniently in chambers; and any judge sitting in chambers may direct any matter to be heard in open court which he may think ought to be so heard; (p) and such matter is to be adjourned at the request of either party, subject to such order as to costs or otherwise as the court may think it right to impose.

The court may adjourn any matter to chambers;

and the judge at chambers may adjourn any matter into court.

(p) English act, 15 & 16 Vic., ch. 80, secs. 27 and 27.

As to costs see *Wallis v. Bastard*, 17 Jur. 1107; 2 W. R. 47; *Leeds v. Lewis*, 3 Jur. N. S. 1290; *Dicken v. Hamer*, 2 L. T. N. S. 276; *Hatch v. Searles*, 2 Sm. & G. 147; *Yeomans v. Haynes*, 24 Bea. 127; *Lister v. Bell*, 5 Jur. N. S. 115; 28 L. J. 162; *Halliley v. Henderson*, 4 Jur. N. S. 202; and *Re Fellows' settlement*, 2 Jur. N. S. 62.

As to the practice in an adjournment from Chambers; see *Saunders v. Walter*, 9 Hare, App. v.; 22 L. J. Ch. 11; 16 Jur. 1008.

This order is varied by the Orders promulgated on the 28th day of April, 1862, as follows:

"APPEALS FROM ORDERS MADE IN CHAMBERS.

One judge will sit daily in each week for the dispatch of business in chambers. Matters adjourned from chambers under section third of order thirty-four of the General Orders of the 3rd day of June, 1853, and applications in the nature of re-hearings to discharge or vary orders made in chambers, are to be heard in full court on the last Wednesday of every month, except during examination terms."

The course of proceedings in chambers to be ordinarily the same as the course of proceedings in court.

SEC. 4.—The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in court upon motion. (q) When an application is made to a judge at chambers, where, according to the present practice, a motion would have been made to the court,

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SEC. 5.—
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notice of the application (where the proceeding is not *ex parte*) is to be served on the opposite party, in the same manner as notice of the motion would have been. In other cases, an appointment is to be obtained from the presiding judge, which may be in a form similar to the form set forth in schedule M. hereunder written, with such variations as the circumstances of the case may require. (r)

Notice of the application is to be served in like manner as notice of motion;

and in other cases an appointment to be made by the judge.

(q) See English Consolidated Orders No. XXXV., Rule 26.

(r) Schedule M. is as follows :

SCHEDULE M.
FORM OF APPOINTMENT.
IN CHANCERY.

A. B., *Plaintiff*,
and
C. D., *Defendant*.

I hereby appoint the _____ day of _____ to proceed, (here state the nature of the business for which the appointment is made,) when all parties are to attend at chambers in Osgoode Hall, in the city of Toronto, at the hour of noon. (To be signed by judge.)

Note. If you do not attend either in person, or by your solicitor, at the time and place above mentioned, such order will be made and proceedings taken in your absence, as the judge may think just and expedient. G. H., solicitor for _____.

No state of facts, charges, or discharges, are to be brought in. But, when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, are to be supplied for the use of the judge. But no copies of deeds or documents are to be made, where the originals can be brought in, without special directions. (s)

No state of facts, &c., to be brought into chambers.

(s) The same provision made as to Master's Office. (Order XLII., sec. 5.)

See English Consolidated Orders, No. XXXV., Rule 26.

SEC. 5.—When it appears to the judge, upon the hearing of any matter, that, by reason of absence, or for any other sufficient cause, the service of notice of the

Service of notice of motion, or of an appointment may be dispensed with upon a sufficient case.

application, or of the appointment, cannot be made, or ought to be dispensed with, the judge, if he think fit, may wholly dispense with such service, or may, in his discretion, order any substituted service; or notice by advertisement, or otherwise, in lieu of such service (t).

(t) English Consolidated Orders, No. XXXV., Rule 18.

New parties may be added in chambers;

and upon service of an office copy of the decree they are to be bound as if they had been parties originally.

SEC. 6.—When, in the prosecution of any proceeding under a decree, it appears to the judge at chambers that some persons, not already parties, ought to be made parties, and ought to attend, or be enabled to attend the proceedings before him, he may direct an office copy of the decree to be served upon such parties, and upon due service thereof such persons are to be treated and named as parties to the suit, and shall be bound by the decree in the same manner as if they had been originally made parties to the suit.

The office copy of the decree is to be endorsed in the manner set forth in schedule N.

Every office copy of a decree directed to be served under this section is to be endorsed with a notice to the effect set forth in schedule N. to these orders, with such variations as circumstances may require. (u)

(u) Schedule N. is as follows:

SCHEDULE N.

NOTICE TO BE ENDORSED ON AN OFFICE COPY OF A DECREE UNDER ORDER XXXIV., SECTION 6.

To Mr. _____ the person upon whom service has been directed.

(Set out the order.)

If you wish to apply to discharge the foregoing order, or to add to or vary the decree, you must do so within fourteen days from the service hereof. (When the order fixes a time for the further proceedings, add) And if you fail to attend at the time and place appointed, either in person or by your solicitor, such order will be made and proceedings taken in your absence, as the judge may think just and expedient; and you will be bound by the decree and the further proceedings in the cause in the same manner as if you had been originally made a party to the suit, without any further notice.

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SEC. 7.—Any party served with an office copy of a decree under the preceding section may apply to the court, at any time within fourteen days from the date of such service, to discharge the order, or to add to or vary the decree. (v)

(v) See English Consolidated Order, No. XXIII., Rule 18.

Directions as to the persons to be served may be obtained in Chambers. (*De-Balinhard v. Bullock*, 9 Hare, App. xiii.) The rule as to serving parties with notice of the decree applies to infants. (*Clarke v. Clarke*, 20 L. J. 88; 1 W. R. 48;) and to parties out of the jurisdiction. (*Chalmers v. Laurie*, 10 Hare, App. xxvii.; 1 W. R. 265.) As to this section, and its application, see also *Maybery v. Brooking*, 7 DeG. M. & G. 673.

TAKING ACCOUNTS.

XXXV. When an account is taken at chambers the presiding judge may give such special direction, if any, as he may think fit, with respect to the mode in which the account is to be taken or vouched; and, in cases where he shall think fit so to do, he may direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised. (w)

The judge at chambers may give directions as to the manner in which the accounts are to be proved and vouched;

and may direct that books of account are to be taken as *prima facie* evidence.

(w) See English act, 15 & 16 Vic. ch. 81, sec. 54.

As to special directions for taking the accounts, see *Millar v. Craig*, 6 Beav. 443; *Allfrey v. Allfrey*, 10 Beav. 353.

As to vouching the account, see *Lodge v. Prichard*, 3 DeG. M. & G. 906; *Ewart v. Williams*, 7 DeG. M. & G. 68, 74, 75.

As to production of books, see *Ogden v. Battams*, 1 Jur. N. S. 791; *Sleight v. Lawson*, 3 K. & J. 292; *Stainton v. Carron Company*, 24 Beav. 346; *Newberry v. Benson*, 28 L. J. Ch. 1008; 2 W. R. 648.

When a decree for an account had been made against a mortgagee in possession, without directing annual rests, the court has no power under this section to add to the decree by directing it to be taken with annual rests. (*Nelson v. Booth*, 3 DeG. & J. 119; 27 L. J. Ch. 782; 6 W. R. 845.)

TAKING ACCOUNTS.—SALES; CONDUCT OF.

[ORDER XXXV., SEC. II. AND III., AND ORDER XXXVI., SEC. I.]

See English Order, No. XXXV., Rule 19, and *Partington v. Reynolds*, 4 Drew, 253; *Delavante v. Child*, 6 Jur. N. S. 118; *Mutter v. Hudson*, 2 Jur. N. S. 34.

In *Lodge v. Prichard*, 3 DeG. M. & G. 906; before the court below, 1 Sm. & G. App. viii.; it seems to have been thought that this section was not retrospective; but in a recent case of *Ewart v. Williams*, 7 DeG. M. & G. 68; 24 L. J. Ch. 414, it was held that it empowered the court to give special directions as to the mode of taking an account, which, though not yet taken, had been directed by an old decree to be taken. Special directions under this section may be determined by the judge in Chambers. (*Attorney-General v. Attwood*, 9 Hare, App. lvi.; 1 W. R. 64; *Newberry v. Benson*, 28 L. J., Ch. 1003; 2 W. R. 648.)

An accounting party is to bring in his account in the form of debtor and creditor, unless the contrary is ordered.

SEC. 2.—An accounting party is to bring in his account in the form of debtor and creditor, and verify the same by affidavit, unless the judge shall otherwise direct. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto, and is to be left at judges' chambers.

And any person desiring to charge an accounting party beyond what he has admitted is to state the amount sought to be charged, and the particulars, as far as he may be able.

SEC. 3.—Any party seeking to charge any accounting party beyond what he has by his account admitted to have received, is to give notice thereof to the accounting party, stating, as far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner. (x)

(x) Secs. 2, 3, of this order, are taken from English Orders XXIX. and XXX., 16th of October, 1852, now consolidated as Order No. XXXV., Rules Nos. 33 & 34.

Where an accounting party brings in his accounts and the other side is dissatisfied with them, the latter may examine the accounting party *viva voce*; but he must give notice of the points on which he wishes to examine. (*Wormsley v. Sturt*, 22 Bea. 398.) The accounting party may be ordered to produce documents. (*Ibid.*)

SALES.

XXXVI.—Sales under the decree or order of this court are to be conducted in the following manner:—(y)

(y) The conduct of the sale is ordinarily entrusted to the plaintiff; (*Knott v. Cottee*, 27 Bea. 38;) even though he would not have been entitled thereto according to the contract if performed without suit. (*Dale v. Hamilton*, 10 Hare, App. vii.) When, however, it appears to be for the benefit of all parties it may be given to a

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SALES; ADVERTISEMENT.

[ORDER XXXVI., SEC. I., II., III., AND IV.]

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defendant, (*Knott v. Cottee, supra*), and every party to the suit having the title deeds is bound to facilitate the sale. (*Ibid.*) Generally the first mortgagee has the conduct thereof. (*Hewitt v. Nanson*, 28 L. J. Ch. 49.)

- (1.) No copy of the decree, or order, or any part thereof, is to be brought into the judge's chambers ^{Copy of decree.} or master's office, but the original decree or order is to be used, unless the judge or master requires such copy.
- (2.) An appointment or warrant is to be obtained from ^{Appointment or warrant.} the judge or master, and served upon all necessary parties.
- (3.) At the time appointed thereby the party having the conduct of the sale is to bring into the judge's ^{Advertisement.} chambers or master's office a draft advertisement, but no particulars or conditions of sale, or any draft or copy thereof. (2)

(2) The particulars of the advertisement must be verified by affidavit, and the propriety of effecting the sale in the manner, or at the place mentioned in the advertisement should appear, and if any particular auctioneer is desired by the party having the conduct of the sale, or by any other party appearing on the settling of the advertisement, an affidavit must be produced, shewing the proposed auctioneer to be a fit and proper person to conduct the sale.

Where an estate was sold under the decree of the court, and in the conditions of sale it was stated erroneously that the property was subject to dower, when in reality the dower attached to the equity of redemption only, in consequence of which the property brought a much less sum than it otherwise would, a re-sale was ordered on the application of the executors of a party who had been surety to the creditor, at whose instance the sale was had, and under the circumstances the costs of the application were ordered to be charged upon the estate. (*Jones v. Clarke*, 1 Grant's Chan. R. 368.)

- (4.) Such draft advertisement is to contain the following particulars, viz.:—1st. The style of cause. 2nd. That the sale is in pursuance of the order or decree of this court. 3rd. The time and place of sale. 4th. A short and true description of the property to be sold. 5th. The manner in which the

SALES; ADVERTISEMENT.

[ORDER XXXVI., SEC. V. AND VI.]

Its contents.

property is to be sold, whether in one lot or several, and if in several in how many, and what lots. 6th. What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether with or without interest, the residue of such purchase money is to be paid. 7th. Any particular or particulars in which the proposed conditions of sale differ from the standing conditions.

Attendance on appointment or warrant.

- (5.) At the time named in such appointment or warrant, the judge or master is, in the presence of all parties served, or of such of them as attend to settle such advertisement, to fix the time and place of sale; to name an auctioneer, where one is to be employed; and to make every other necessary arrangement preparatory to the sale, so that nothing may remain to be done but to insert the advertisement; and all the before mentioned matters must be done at one meeting, namely, upon the return of the appointment or warrant, where it is practicable, and no adjournment of such meeting is to take place, and no new meeting is to be appointed for the aforesaid purposes, unless it be unavoidable. (a)

(a) In infancy matters under 12 Vic., ch. 72, the advertisement is settled by a judge in chambers, on an *ex parte* application.

Insertion of advertisement.

- (6.) The advertisement is to be inserted by the party conducting the sale, at such times and in such manner as the judge or master has appointed at the meeting before mentioned.

Upset price or reserved bidding.

- (7.) The judge or master may fix an upset price or reserved bidding, where it is thought expedient, without further order; but this must be done at

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the meeting before mentioned, and it must be ^{Who to conduct sale.} notified in the conditions of sale; the master or his clerk is to conduct the sale where no auctioneer is employed; the deposit is to be paid to the ^{Deposit.} vendor, if present, or if not, to his solicitor, at the time of sale, and is to be forthwith paid by him into court: biddings need not be in writing, ^{Biddings.} and all parties, except the one having the conduct of the sale, may bid thereat, provided it be notified in the conditions of sale; a written agreement is to be signed by the purchaser at the time of ^{Agreement.} sale; (b) after the sale is concluded the auctioneer, where one is employed, is to make the usual affidavit according to the present practice, and where no auctioneer is employed the master or his clerk is to certify to the court to the same effect, but the master is to make no report allowing the purchaser in any case.

(b) This conflicts with the Order of 22nd February, 1862, which directs the contract to be printed.

Before the passing of this order the court would allow a reserved bid by the plaintiff and defendant if all parties consented. (*Phillips v. Conger*, 1 U. C. Jur. 2, page 231.)

Where the plaintiff omitted to ask for a reserved bid on the settlement of the advertisement, and the advertisement was issued, liberty was given in chambers to have a reserved bid, and the advertisement and conditions of sale altered accordingly. (*Frazer v. Bens*, *Grant's Cham.* 71.)

If reserved biddings are fixed, they must be made one of the conditions of sale. If it is considered desirable to have reserved biddings fixed, a valuation of the property should be made, and an affidavit filed with the Master setting forth the estimated value and the sum at which the estate ought to be sold. The Master, with such evidence before him, fixes the reserved biddings, which he commits to writing, and encloses under a sealed cover and delivers to the person appointed to sell the property. The affidavit for the purpose of enabling the Master to fix a reserved bid should clearly state, as near as circumstances will admit, the value of the property by reference to an exhibit containing such value, so that the value may not be disclosed by the affidavit when filed.

The reserved biddings must not be opened until the time of the sale, and should not be divulged to any person, either at, or at any time after the sale. Where property, however, was (in consequence of there being no bidding equal to the price

reserved) declared not sold, and the price reserved was afterwards disclosed to a person present who agreed to purchase the estate at the reserved price, the court held that he could not repudiate his purchase. (*Else v. Barnard*, 6 Jur. N. S. 621.)

Leave was given to the plaintiff to bid at the sale without taking from him the carriage of the decree, where he was the first incumbrancer, and the property clearly insufficient to pay his demand. (*Steele v. Devonport*, 11 Ir. Eq. R. 389.)

A mortgagee having bid at the sale of the mortgaged property, and become the purchaser without having obtained an order previously for leave to bid, the court granted him an order *nunc pro tunc*. (*Ex parte Pedder, re Hadwen*, 8 Dea. & Ch. 622; 1 Mont. & A. 327.)

Although it is the usual and the prudent practice for a mortgagee to apply to the court for leave to bid, the court will not rescind the sale where the mortgagee has purchased the property without such leave if the purchase has been made by him *bona fide*. (*Ex parte Ashley, re Bell*, 8 Dea. & Ch. 510; 1 Mont. & A. 32.)

These cases seem to conflict with the practice which has been adopted in our court, where the practice has always been for the mortgagee having the conduct of the sale either to transfer the conduct thereof, if he desired to bid, to a defendant, or if that were impossible to obtain an order from the court upon a special application for that purpose for leave to bid. The order provides that "all parties except the one having the conduct of the sale may bid thereat, provided it be notified in the conditions of sale;" and the third of the standing conditions of sale provides that "the parties to the suit with the exception of the vendor are to be at liberty to bid."

Notwithstanding the before cited cases it would seem that the order is not directory only, and can only be varied in its application by the special order of the court for that purpose first obtained, and it is clear that the master has no power to make any provisions under this section which are not strictly within the terms of the order, and in a recent decision it has been held as the settled rule of the court, that the plaintiff or his solicitor cannot bid at a sale under a decree without the leave of the court; non-compliance with this rule will vitiate the sale. (*Popham v. Exham*, 10 Ir. Ch. R. 440.)

Form of contract (8.) (c) [Abrogated and discharged by Order of court
Signing. dated the 26th day of February, 1862.]

Filing of contract. (9.) (c) [Abrogated and discharged by Order of court
Confirmation of sale. dated the 26th day of February, 1862.]

(c) Sections 8 and 9 of this Order are abrogated and repealed by Order of court promulgated on the 26th day of February, 1862, which Order is as follows:

"SATURDAY, 22ND FEBRUARY, 1862.

It is ordered that sections 8 and 9 of the 36th of the General Orders of this court of the 3rd of June, 1853, be and the same are hereby repealed; and it is further ordered, that in future all sales are to be with the approbation of one of the Masters of this court, who is to report the same to the court, such report to be in the form hereunder set forth, or as near thereto as circumstances will permit, that is to say:

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"IN CHANCERY.

(Title of Cause.)

Pursuant to the decree (or order) of this honourable court, bearing date the — day of — and made in this cause, I have, under the General Orders of this court, in the presence of (or after notice to) all parties concerned, settled an advertisement and particulars and conditions of sale for the sale of the lands mentioned or referred to in the said decree, (or order,) and such advertisement having, according to my directions, been published in the (naming the newspaper or newspapers) once in each week for the four weeks immediately preceding the said sale, (or as the case may be,) and bills of the said sale having been also, as directed by me, published in different parts of the township (town or city) of — and the adjacent country and villages, (or as the case may be,) the said lands were offered for sale by public auction according to my appointment, on — day of —, by me, (or by Mr. — of —, appointed by me for that purpose, auctioneer,) and such sale was conducted in a fair, open and proper manner, when — of — was declared the highest bidder for, and became the purchaser of the same at the price or sum of £ —; (or when sold in different lots, that A. B. became the purchaser of lot No. 1, at the price or sum of £ —, C. D. of lot No. 2, at the price or sum of £ —, as the case may be;) all which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this honourable court.

Under the printed conditions of sale is to be printed a blank form of contract in these words, or to this effect:—"I agree to purchase the property (or lot No. —) mentioned in the annexed particulars, for the sum of £ —, and upon the terms mentioned in the above 'conditions of sale,' which is to be signed by the purchaser."

Witness.

The practice under this order may be shortly stated as follows: The affidavit of the auctioneer must be procured; (for form of which, see Book of Forms, Part the Second, *infra*;) the contract in the form prescribed by the order; the affidavit as to the insertion of the advertisements, (together with the newspapers in which they have been inserted,) and the publication of the bills or posters, should be filed in the Master's office to whom the cause stands referred, who thereupon issues his warrant, to hear and determine and to settle his report as to the sale; on the return of which warrant, the evidence as to the sale is gone into, if the proceedings of the sale are regular, and the report is thereupon settled and signed; the report must then be filed, and fourteen days after filing, like other reports, it stands confirmed, and the sale is thereby also confirmed. Previous to the Order of the 26th of February, 1862, the sale papers referred to in the abrogated section (8) had to be filed in the office of the Registrar at Toronto, and that, too, whether the advertisement was settled, and the proceedings as to the sale were taken before the master or a judge in chambers. (Patterson v. Stanton, 4 Grant's Cham. Rep. 100.) But this practice is now rendered obsolete by the new order, and every sale, made under a decree of the court, must now be confirmed in manner and form thereby provided.

- (10.) Such sale must be objected to by motion to the court to set aside the same, and notice of such motion must be served upon the purchaser and the other parties to the cause. Objection to sale.
- (11.) At any time after the confirmation of the sale the purchaser may pay his purchase money and

Payment of purchase money into court, and admission into possession.

Obtaining possession.

interest, or the balance thereof, into court without further order, but with the privity of the Registrar, and upon notice to the party having the conduct of the sale; and shall thereupon be entitled to be let into possession of the estate, and may either proceed, according to the present practice, to obtain possession thereof, or, if such possession be wrongfully withheld from him, may at his own expense obtain an order against the party in possession for the delivery thereof to him. (d)

(d) A purchaser under a decree cannot take possession; (Hutton v. Mansell, 2 Bea. 260;) or pay his money into court, (Denning v. Henderson, 1 DeG. & Sm. 689; 16 L. J. Ch. 178; but see Dempsey v. Dempsey, 1 DeG. & Sm. 691,) without accepting the title, and an application to pay the money into court, and to be let into possession without prejudice to objections to the title, will be refused; (Rutter v. Marriott, 10 Bea. 33; Crooks v. Street, Grant's Cham. 95; 8 U. C. L. J. 187; but vide Marfell v. Rudge, 2 Y. & C. Ex. R. 536;) nor will a purchaser be relieved (when he purchases under a decree of the court) from his purchase merely because there are irregularities in the decree. (Baker v. Sowter, 10 Bea. 343.) *Secus*, if there is a want of jurisdiction or parties; (*ibid.*;) and see, as to equitable interests being bound by the decree, *Re Williams*, 5 DeG. & Sm. 515. A purchaser under a decree is entitled to his costs when the title is bad. (Smith v. Nelson, 2 S. & S. 557.)

An order upon the purchaser to pay his purchase-money into court cannot be obtained until the title has been accepted or approved of, or the Master's report obtained in its favour; and such an order obtained before such acceptance or report, upon affidavit of service of notice of motion, was discharged with costs. Applications of purchasers to pay purchase-money into court, and to be let into possession without prejudice to objections to the title, are always refused. (Rutter v. Marriott, 10 Bea. 33; and see Crooks v. Street, Grant Cham. 95; 8 U. C. L. J. 187; Hutton v. Mansell, 2 Bea. 260.) But see Miller v. Pridden, 26 L. J. Ch. 183; 3 Jur. N. S. 78; and Morris v. Bull, 17 L. J. Ch. 9; 12 Jur. 4; Dempsey v. Dempsey, 1 DeG. & S. 691; where purchasers were allowed to pay in their purchase-money without accepting the title, where there were any special circumstances to induce the court to allow it to be paid in, as for the purpose of preventing the accruing of interest. In Dempsey v. Dempsey, cited *supra*, notwithstanding the general rule, the court may, under special circumstances, permit a purchaser to pay his purchase money into court before he has accepted the title; but in such case express provision must be made against his taking possession until he shall have accepted the title. A similar order was made in Morris v. Bull, cited *supra*, on the authority of *Hinde v. Dakins*, 1 C. P. Cooper Rep. temp. Cottenham, 378. But see *Ouseley v. Anstruther*, 11 Bea. 399; 18 L. J. Ch. 157; where the court held that, on an application by a purchaser to pay in purchase money without prejudice to objections to the title, such an order would be contrary to the rule of the court, but that the rule was not inflexible, although in this case the court refused to make the order even with the consent of the purchaser. The application had been made by parties to the suit.

On an application to pay in the purchase money, only the vendor's solicitor is entitled to appear on the motion.

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It is irregular to pay the purchase money to the party, it ought to be paid into court. (*Bennett v. Hamill*, 2 Sch. & Lef. 581.) And as to payment of purchase money into court, see *Offen v. Harman*, 8 W. R. 129.

A purchaser under a decree having re-sold with a profit before the confirmation of the sale, the person to whom he has sold is to be considered as a substituted purchaser, and must pay the additional purchase money into court for the benefit of the parties to the suit. (*Hodder v. Ruffin*, Taml. 341.)

Where an estate was sold under a decree, and one of the conditions of sale was that the purchaser pay the purchase money into court on a given day at his own expense, it was held that the purchaser was entitled to the costs of a reference as to the title reported good by the Master. (*Camden v. Benson*, 1 Keen, 671.) When a purchaser neglects to pay in his purchase money, and no objection is made to the title, the court will order him within a limited time to pay in the amount with interest; or in default direct a re-sale of the property, and that the purchaser pay costs of motion and deficiency, if any, on such re-sale. (*Crooks v. Crooks*, 4 Grant's Ch. R. 376.)

It is a clear rule of equity that persons purchasing under a decree of the court are bound to see that the sale is made in accordance with the decree. (*Colclough v. Sterum*, 3 Bli. 181.) A purchaser should therefore not only ascertain that the title to the property is good; but should satisfy himself that the sale has been made according to the decree; that all persons who are necessary to convey are before the court; if he takes a title which a decree in an imperfect suit does not protect, he must suffer the consequence. (*Ibid.*) Where, however, there is error in the decree itself, the court will not compel a purchaser to take an estate sold under it, even though the parties may proceed to rectify the error. (*Lechmere v. Brasier*, 2 J. & W. 287; *Calvert v. Godfrey*, 6 Bea. 97; *Sherwood v. Beveridge*, 13 Jur. 1042; but see *Baker v. Sowter*, 10 Bea. 343.)

If the purchaser neglect to pay in his purchase money in due time, the plaintiff may apply for an order that the purchaser may, within a given time, pay in his money, together with interest and the costs of the application, which will be ordered accordingly. The order, however, cannot be obtained, until the purchaser has either accepted the title, or, upon a reference, (see sec. 12,) a report that a good title can be made is obtained. (*Rutter v. Marriott*, 10 Bea. 33.) The order obtained must be served, and it should be endorsed as provided by Order XLVI., sec. 6, and if the purchaser neglects to comply, it may be enforced in the usual way.

The court will not allow a purchaser to take possession without prejudice to objections to the title, even upon payment of his purchase money into court. (*Hutton v. Mansell*, 2 Bea. 260; *Morris v. Bull*, 12 Jur. 4.)

It would seem that a purchaser at a sale under a decree or order of the court having a right to insist upon covenants from the grantors cannot be compelled to accept title under a vesting order instead of a conveyance. (*Slater v. Fiskin*, Grant's Cham. R. 1; 4 U. C. L. J. 261.) The purchaser has a right to require proof that the persons whose estates are sold were living at the date of the sale. (*Ibid.*)

If the purchaser delay paying in his purchase money, and such delay is not occasioned by default of the vendor, the purchaser will not be entitled to an earlier receipt of the rents, although intermediate payments on account of rent may have accrued due, which in such case always belong to the vendor; for the purchaser may always entitle himself to the receipt of the rents by applying specially for an order to be at liberty to pay in his purchase money, without such order operating as an acceptance of the title. (*Hooper v. Goodwin*, 1 Coop. 95; *Lloyd v. Waite*, 1 Turn. 70.)

To enforce possession the purchaser should apply on notice of motion to a judge in chambers, which must be served on the person in possession, for an order for delivery of possession within a limited time, and upon service of the order and of a demand as hereinbefore referred to, (see page 129,) and the person in possession being a party to the cause, the purchaser may proceed by writ of assistance as previously directed. If a person, not a party to the suit, be in possession, the purchaser must proceed by ejectment.

Investigation of
title.

- (12.) (e) When an enquiry into title has been directed by the court, the vendor is to deliver an abstract of the title to the purchaser, and if the purchaser does not object to the title and obtain and serve an appointment or warrant from the judge or master, to consider the same, within fourteen days after the delivery of such abstract, he is to be deemed to have accepted such title; at the time of serving the appointment or warrant the purchaser must deliver to the vendor a written notice of the objections to the title; at the time appointed a duplicate of such notice is to be brought into the judge's chambers or master's office by the objecting party, and such objections are to be argued before the judge or master, who is to allow or disallow such objections; and such allowance or disallowance is to be subject to appeal by way of motion to the court; (f) the judge or master is to make no report upon the title, but the judge or master is merely to mark the objections allowed or disallowed, as the case may be; such objections so marked are to be filed, and such allowance or disallowance is to stand absolutely confirmed, unless appealed from within fourteen days after such filing.

(e) This section regulates the practice in regard to all enquiries as to title, whether under sales by the direction of the court, or otherwise.

When the abstract is served there should also be served at the same time a notice that if the purchaser do not object to the title and obtain and serve an appointment or warrant within fourteen days he will be deemed to have accepted the title.

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Whatever a vendor puts on his abstract he is bound to prove and verify if required. *Parr v. Lovegrove*, (Eng.) 5 U. C. L. J. 22; which see as to making and shewing a good title generally.

If the Master report against the title he should state in what points the title is defective. (*Green v. Monks*, 2 Mol. 825.)

A purchaser of an entire estate divided into shares, the title to one of which is defective, cannot be compelled to accept the remaining shares. (*Hurd v. Robertson*, 5 U. C. L. J. 67.)

(f) *Held*, on appeal from the Master's report, that a purchaser is entitled to call for a release from all judgment creditors who have registered their judgments in the county where the lands sold are situate, or the creditors join in the conveyance to the purchaser, although it appears that the purchase money will be exhausted in discharging prior incumbrances. If the vendor cannot procure such release or concurrence in the conveyance, the court will not compel the purchaser specifically to perform the contract. (*Spohn v. Ryckman*, 7 Grant's Chan. R. 388.)

Everything connected with the title may be the subject of enquiry; (*Bennett v. Rees*, 1 Keen, 408;) see also *Lesturgeon v. Martin*, 3 M. & K. 255; and *contra*, *Saul v. Bolton*, where an enquiry was directed having regard to the requisitions only. (*Seton on Decrees*, 3rd ed., 594.)

The direction and enquiry should be, whether the vendor can make a title, not whether he could at the time of entering into the contract; (*Langford v. Pitt*, 2 P. W. 680; *Parr v. Lovegrove*, 4 Drew. 170;) and so even though the vendor had no title at the date of his contract. (*Hoggart v. Scott*, 1 R. & M. 298.)

There should also be a direction and an enquiry as to when the title was first shewn, with a view to granting or refusing costs; (*Bennett v. Rees*, 1 Keen, 409; *Wilkinson v. Hartley*, 15 Beav. 188; but see *Lyle v. Yarborough*, John. 70;) for as a rule the vendor will only be entitled to costs from the date of completion of title; (*Anon*, cited 1 Mad. 536;) and will, up to such date, be ordered to pay costs. (*Harford v. Purrier*, 1 Mad. 536.) This portion of the enquiry is omitted where other questions besides that of title are in dispute. (*Gibbins v. North Eastern Metropolitan District Asylum*, 11 Beav. 1.) If the decree contains no such direction, and a report is made in favour of the title without enquiring as to the time of completion, it would seem that the vendor will be allowed his costs. (*Croome v. Lediard*, 2 M. & K. 293.) A title is first shewn when a complete abstract is delivered; (*Parr v. Lovegrove*, 4 Drew. 170, 6; see also *Avarne v. Brown*, 14 Sim. 303;) and is first made when such abstract is proved and verified; (*ibid*;) as to what is a complete abstract, see *Lord Braybroke v. Inskip*, 8 Ves. 486.

Upon an enquiry as to title the purchaser is entitled to the best assurance as to the title which circumstances will admit, by means of enquiries and examination to sift the vendor's conscience, and by the production of all deeds and documents. (*Per Eldon, C. in Jenkins v. Hiles*, 6 Ves. 658.)

The right to object to the title rests only with the purchaser, it is not competent for the vendor to assert his own title to be bad. (*Bradley v. Munton*, 15 Beav. 460.)

Questions as to the application of the conditions of sale are questions of title. (*Wood v. Machu*, 5 Hare, 158.)

The identity of a person or of parcels apparently different on the deeds is a matter of title. (*Sherwin v. Shakespeare*, 17 Beav. 267-75.)

An enquiry as to title will be directed as to any species of property, a contract

respecting which the court will specifically perform, such as shares in railway and mining companies. (*Curling v. Flight*, 2 Phil. 618; *Shaw v. Fisher*, 2 DeG. & Sm. 11.)

An enquiry as to title will be directed before answer, if it be admitted on the motion that there is no other question than that of title; (*Balmanno v. Lumley*, 1 V. & B. 224; see also 1 Mer. 372;) *secus* where there is no such admission. (*Matthews v. Dana*, 3 Mad. 470.)

Though the Master report against the title, the purchaser will not be discharged if the title can be made good within a reasonable time. (*Chamberlain v. Lee*, 10 Sim. 444; *Coffin v. Cooper*, 14 Ves. 205; *Sidebotham v. Barrington*, 4 Beav. 110.)

The Master should report unconditionally whether the title be good or not; it would be improper to report that a good title could be made subject to the performance of certain conditions, or with the concurrence of a third party. (*Magennis v. Fallon*, 2 Mol. 561, 575, 583; *Lewis v. Loxam*, 1 Mer. 179.)

Where a report allowing the title is appealed against, and the appeal is dismissed, the title cannot be further objected to. If, however, the appeal is allowed, further objections may be made on the delivery of a fresh abstract. (*Brook v. —*, 4 Mad. 212.)

— Even though the Master report in favour of the title, if on an appeal the court think it too doubtful to force on a purchaser, they may dismiss the bill. (*Robinson v. Milner*, 1 Hare, 578, n; *Willcox v. Bellaers*, T. & R. 491.)

Where on an appeal from the report allowing the title the court is dissatisfied with evidence of a fact which had satisfied the Master, they will refer it back, the vendor offering to produce additional evidence. (*Andrew v. Andrew*, 3 Sim. 390.)

It would seem that if the decree omit the reference as to title, though the defendant did not object to the omission at the settlement of the minutes, the decree would be amended on a re-hearing at his instance, and an enquiry directed. (*Hughes v. Jones*, Eng., 5 U. C. L. J. 46.)

As soon as the sale is confirmed, in manner hereinbefore mentioned, the purchaser's solicitor proceeds to investigate the title, and if on looking into the abstract he finds any objections to it which cannot be settled out of court, he follows the course provided by this section.

As to the conveyance on sale by court, and parties thereto.—The draft conveyance is prepared by the purchaser's solicitor, at the purchaser's expense. The conveyance, when settled and approved, must afterwards be executed by the parties, at the vendor's expense. Where the purchaser requires the execution of the deed to be attested by his own solicitor, that requisition ought not to be refused, unless under special circumstances. (*Viney v. Chaplin*, 27 L. J. Ch. 484; 4 Jur. N. S. 619; 6 W. R. 562; 31 L. T. 142.) If any party refuses to execute, an order may be obtained, upon motion in chambers, notice of which must be served on the party for him to execute the deed. The order thereupon obtained can be enforced in the usual way, by order absolute and attachment.

The decree usually, and indeed invariably, contains a provision that the Master shall settle the conveyance in case the parties differ about the same. It has been held that the purchaser must pay the costs of his attendances in the Master's office, unless he can make out a special case for exemption. (*Hodgson v. Shaw*, 16 L. J. Ch. 56; 11 Jur. 95.)

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SALES; INVESTIGATION OF TITLE.
[ORDER XXXVI., SEC. XII.]

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ance of the mortgaged estate. (*In re Williams*, 21 L. J. Ch. 487; *Ross v. Steele*, Grant's Cham. 94; 8 U. C. L. J. 187.)

The wife of the mortgagor is also an unnecessary party to such conveyance, if she has barred her dower in the mortgage. (*Moore v. Shinnars*, Grant's Cham. 69.)

In sales under the decree of the court, the Canada Company are bound to covenant against their own acts as to lands granted by the Crown, and as to other lands they must give full covenants. (*Scarlett v. The Canada Company*, Grant's Cham. Rep. 90.)

Where the mother of infants makes an application for the sale of their estate under Order XXXVII., *infra*, she will be required to join in the conveyance in order to surrender her life interest. (*In re Kennedy*, Grant's Cham. 97; 8 U. C. L. J. 188.)

As a rule the purchaser has a right to a covenant for the production of all documents necessary to make out a good sixty years' title.

Not, however, if they are not in the power of the vendor; (*Cooper v. Emery*, 1 Ph. 388;) nor merely because they are mentioned in the abstract. (*Ibid*.)

As to covenants to be entered into by trustees, see *Worley v. Frampton*, 5 Hare, 560.

The conveyance should be dated from the time the title is shewn. (*Townsend v. Champernowne*, 3 Y. & C. 505.)

If the decree do not contain a direction to settle the conveyance, it can be inserted on petition. (*Trevelyan v. Charter*, 9 Beav. 140.)

Where the vendor has contracted that certain parties shall join in the conveyance, the purchaser can insist upon their so joining, and the court will not consider whether such parties are necessary or proper. (*Benson v. Lamb*, 9 Beav. 502.)

The vendor (if the sale be under a mortgage) cannot be compelled to do more than enter into the usual covenant that he has done no act to incumber the property. (*Worley v. Frampton*, 5 Hare, 560, 566.) This case was followed by *Esten, V. C.*, in *Ireland v. McMaster*, (not reported,) Chambers, May, 1862.

Upon the conveyance being executed, the purchaser is entitled to have the title deeds delivered up to him. Where the property sold consists of several lots, the rule of the court is, that the purchaser of the largest single lot is to have the title deeds, and not the purchaser of divers lots, which in the aggregate exceed in value and extent the largest single lot. (*Scott v. Jackman*, 21 Beav. 110.) The words "largest lot" have reference to quantity, and not to price. (*Griffiths v. Hatchard*, 18 Jur. 649; 2 W. R. 672.) The purchasers of the other lots are entitled to a covenant for production of the title deeds. (*Peterson v. Elwes*, 6 W. R. 611; but see *Strong v. Strong*, 4 Jur. N. S. 943; 6 W. R. 455.) If the order for payment of the purchase money contains no direction for delivery of the title deeds, an order for such purpose may be obtained on motion in Chambers. On completion of the purchase, the vendor's solicitor should obtain from the purchaser a written authority to make use of his name to consent to any application that may be made to the court to deal with the purchase money. The costs of the purchaser's appearance, on such an application, will not in general be allowed. (*Barton v. Latour*, 18 Bea. 526; but see *Strong v. Strong, supra*.)

Rescinding the contract.—If, upon an investigation of the title, the judge or master certifies against the title, the purchaser should apply on motion in Chambers to be discharged from his purchase; and that his costs, charges, and expenses of investigating the title and consequent thereon, may be paid.

A purchaser at a sale under a decree of the court, cannot move to be discharged from his purchase until the report has been confirmed, the report being the only evidence that the court can receive as to the purchase having been made. (*Macculloch v. Gregory*, 2 W. R. 575.) A purchaser under a decree was discharged from his purchase on the ground of misrepresentation where the facts were that the occupation was hostile, and possession could only be obtained, by ejectment; (*Lachlan v. Reynolds*, 1 Kay, 52; 23 L. J. Ch. 8; 2 W. R. 49; 22 L. T. 211;) and see also *Drysdale v. Mace*, 28 L. J. Ch. 518; 2 W. R. 280; *McCulloch v. Gregory*, 1 K. & J. 286; 24 L. J. Ch. 246; 24 L. T. 807; 3 W. R. 231.)

And as to rescinding the contract on the ground of misdescription, see *Leyland v. Illingworth*, *ex parte Webster*, 2 L. T. N. S. 456, 587; 3 W. R. 695; *Turner v. The West Bromwich Union*, 9 W. R. 155; 3 L. T. N. S. 662.

An agreement between two persons not to bid against each other, is not in itself a ground for setting the sale aside, nor for opening the biddings. (*In re Carew*, 26 Bea. 187; 28 L. J. Ch. 218; 4 Jur. N. S. 1290; 7 W. R. 81; 32 L. T. 154.) The dictum of Lord St. Leonards, V. & P. 93, was disapproved in this case. If it appears that the purchaser is not a responsible person, and unable to perform his contract, the vendor, instead of proceeding to enforce the contract, may apply to have the purchaser discharged from his bidding, and that the estate may be re-sold; (*Hodder v. Ruffin*, 1 V. & B. 544;) and in such case the purchaser will be ordered to pay as well the expenses arising from the non-completion of the purchase, the application and the re-sale, as also any deficiency in price arising from the second sale. (*Harding v. Harding*, 4 M. & C. 514; but see *Re Healey*, Grant's Cham. R. 54.) The order is obtained on application at Chambers, on notice to the purchaser and the parties in the cause, and upon an affidavit of the facts on which it is grounded.

If the purchaser is desirous of being discharged from his contract, and of substituting another person in his stead, an order for such purpose may be obtained on application at chambers; but the court requires to be satisfied by affidavit that there is no under-bargain, for the new purchaser may give the other a sum of money to stand in his place, and so deceive the court. (*Rigby v. Macnamara*, 6 Ves. 515; *Vale v. Davenport*, 6 Ves. 615.)

Opening biddings.—Where estates are sold under the decree of the court, the court considers itself to have greater power over the contract than it would have over a contract made outside the cause; the chief object of the court is to obtain as great a price for the estate as can possibly be got. The court, therefore, is in the habit, after the estate has been sold, of "opening the biddings," (that is, of allowing a person to offer a larger price for the property than it was originally sold for,) and, upon such offer being made, and a proportionate sum paid in, of directing a re-sale of the property. (*Daniell's Ch. Pr.* 2nd edit. 1209.) A lot at a sale under the court having been sold for £730 and an advance of £80 having been offered, the biddings were opened on the usual terms, although the application was opposed. (*Terson v. Hawkins*, 18 Jur. 721; 3 W. R. Dig. 71.) See also *Barlow v. Osborne*, 6 H. L. C. 556, 27 L. J. Ch. 808; 4 Jur. N. S. 367; 31 L. T. 45; 6 W. R. 315; as to opening biddings and ordering a re-sale on an advance of price being offered. The court will not grant the application except upon an advanced bidding. As a general rule ten per cent. was usually considered a sufficient advance. (*Anon*, 3 Mad. 494.) In some cases, however, the court require more, and in some it will be satisfied with less. (*Brooks v. Snaith*, 3 V. & B. 144; *Bourn v. Bourn*, 13 Sim. 189; *Wallond v. Wallond*, 9 Jur. 479; *Manners v. Furze*, 17 L. J. Ch. 485; *Terson v. Hawkins*, 18 Jur. 721; *Farlow v. Weildon*, 4 Mad. 460.) The biddings are not opened when estate sold by private contract. (*Millican v. Vanderplank*, 11 Hare, 136.) Any person may apply to open the biddings, but the court exercises its discretion if the party had attended the sale, or the circumstances of the application are suspicious. (*Tyndale v. Warre*, Jac. 525;

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Lefroy v. Lefroy, 2 Russ. 606; *In re Jones*, 1 Giff. 284; 29 L. J. Ch. 139; 5 Jur. N. S. 1248; 8 W. R. 56.) The biddings may be opened more than once. (*Preston v. Barker*, 16 Ves. 140.)

Applications to open biddings must be made before the report on the sale is confirmed; when it was attempted to re-open the biddings on a sale by order of the court after same confirmed, on the ground of an advanced bidding, the court held the reason insufficient and refused the application; (*Ware v. Watson*, 7 DeG. M. & G. 739; 25 L. J. Ch. 199; 2 Jur. N. S. 129; 4 W. R. 228; *Sir Thomas Jones's Settled Estates*, 1 Gif. 284; 8 W. R. 56; 5 Jur. N. S. 1248;) and the purchaser after the sale is confirmed is considered to be so far the absolute owner that he may sell the estate at an advanced price for his own benefit. (*Dewell v. Tuffnell*, 1 K. & J. 324.) See also *Bridger v. Penfold*, 1 K. & J. 28; *Osborne v. Foreman*, 8 DeG. M. & G. 122; 25 L. J. Ch. 840; 2 Jur. N. S. 381; 27 L. T. 9. *Millican v. Vanderplank*, 11 Hare, 186.)

Where fraud is alleged on the part of the purchaser the court will open the biddings, notwithstanding the report has been confirmed. (*Fergus v. Gore*, 1 Sch. & Lef. 356)

The order is obtained on motion in Chambers, notice of which must be served on all the parties to the cause and on the purchaser. When the biddings are opened the purchaser is entirely discharged from his purchase, and is entitled to have his deposit and purchase money (if paid) returned to him and his costs of the former purchase.

1858, January 14, V. C. *Esten* held that this section applied to references as well under decrees for specific performance, as to sales under a decree of the court.

- (13.) The standing conditions of sale are to be those set forth in schedule O. attached to these orders. Standing conditions of sale.
(g)

(g) Schedule O. is as follows:

SCHEDULE O.

CONDITIONS OF SALE.

- 1st. No person shall advance less than £2 at any bidding under £100, nor less than £5 at any bidding over £100, and no person shall retract his bidding.
- 2nd. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.
- 3rd. The parties to the suit, with the exception of the vendor, are to be at liberty to bid.
- 4th. The purchaser shall, at the time of sale, pay down a deposit in the proportion of £10 for every £100 of his purchase money to the vendor or his solicitors, and shall pay the remainder of the purchase money on the _____ day of _____ next; and upon such payment the purchaser shall be entitled to the conveyance, and to be let into possession _____; the purchaser, at the time of such sale, to sign an agreement for the completion of the purchase.
- 5th. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6th. If the purchaser shall fail to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon shall be forfeited and the premises may be re-sold; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, shall be made good by the defaulter.

APPLICATION FOR THE SALE OF INFANTS' ESTATE UNDER
12 VICTORIA, CH. 72.

XXXVII. A petition for the sale or other disposition of the real estate of an infant, is to be intituled both in the matter of the infant and in the matter of the 12th Victoria, chapter 72. (*h*)

(*h*) The application to settle the advertisement of sale may be made to a judge *ex parte*.

Where an executor has obtained a final order of foreclosure of mortgage belonging to the estate, and applies for a sale thereof and order for conveyance by the infants, the petition and affidavits should be styled in the matter of the infants, &c., and not in the foreclosure suit. (*Re* Hodges, 1 Grant, 285.)

As to the practice under the statute before the Orders of 1853, see *Re* McDonald, *Re* Taylor, 1 Grant, 90, 91.

In applications under this order the court considers whether the sale will be for their ultimate benefit, and not whether it is for the present comfort of them and their mother; the interests of the infants only are looked after, not those of the mother or any other person. (*Re* McDonald, Grant's Cham. 97; 8 U. C. L. J. 188.) The court will order a sale of part of the infants' property in order to save the rest if it would be for the ultimate benefit of the infants. (*Ibid.*) In this case the court ordered the infants to be examined by the Master touching their consent to the sale, pursuant to sec. 6 of this order.

The court will not direct a sale of infants' estate merely because the ancestor was indebted, it must be shewn that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit. (*Re* Boddy, 4 Grant, 144.)

Where the mother of infants makes an application for the sale of their property which has been settled upon the infants by their ancestor, she must shew that the children have no other property out of which to maintain them. (*In re* Kennedy, Grant's Cham. 97; 8 U. C. L. J. 188.) She will also have to join in the conveyance to surrender her life interest. (*Ibid.*)

A person contracting to purchase infants' estate is not bound by his contract unless an order for sale thereof be obtained under this order. (*In re* Yaggie, Grant's Cham. 52.)

A person so contracting is bound, though the sale be without the sanction of the court, if he afterwards consent to an infancy order being made under this order; he would be relieved, however, if great delay occurred in getting the infancy order; he would not be relieved, however, upon an application made after the infancy order had been obtained, even though great delay had occurred in obtaining it. (*Ibid.*)

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Where a purchaser of infants' estate, who had gone into possession, made improvements, and paid part of his purchase money, moved to be relieved from his contract on the ground of inability to complete it, he was so relieved, but only on the terms of forfeiting the improvements and purchase money so paid so far as they had gone to the infants. (*Ibid.*)

It would seem that a purchaser becoming insolvent will be relieved from his purchase, and his being required to make good any deficiency on a re-sale is in the discretion of the court. (*In re Heely*, Grant's Cham. 54; but see *Hodder v. Ruffin*, 1 V. & B. 544; *Harding v. Harding*, 4 M. & C. 514.) It will be observed on reference to the reports of these cases that the applications were made on behalf of the vendor.

SEC. 2.—The petition is to be presented by the guardian of the infant, or by a person applying by the same petition to be appointed guardian, as hereinafter provided.

Petition to be presented by guardian.

SEC. 3.—The petition is to state the nature and amount of the personal property to which the infant is entitled—the necessity of resorting to the real estate—its nature, value, and the annual profits thereof. It must state circumstances sufficient to justify the sale and disposition of the estate, and the application of the proceeds in the manner proposed. The prayer must state specifically the relief that is desired; it must designate the lands to be disposed of, and must propose a scheme for that purpose, and for the appropriation of the proceeds. If an allowance for the maintenance is desired, it must be so prayed, and a case must be stated to justify such an order, and to regulate the amount. (i)

The petition is to state the amount of personal estate, the value of the real estate;

the circumstances which warrant a sale.

The relief prayed must be specially stated.

(i) The petition must be verified by affidavit annexed thereto.

SEC. 4.—The petition may pray for the appointment of a guardian, as well as for the disposal of the infants' estate. In that case a proper case must be made by the petition, and established by the evidence, for the appointment of the person proposed.

The petition may pray for the appointment of a guardian as well as the sale of the estate.

Infant to be produced before a judge or master.

SEC. 5.—Upon all petitions for the sale of an infants' estate, the infant is to be produced before one of the judges at Chambers, or before a master.

Infant to be examined before a judge or master.

SEC. 6.—When the infant is above the age of seven years he is to be examined, apart, upon the matter of the petition, and his consent thereto, by the judge or master, as the case may be; and his examination is to be stated to have been taken under these orders, and is to be annexed to, and filed with the petition. Where the infant is under the age of seven years, the fact is to be certified by the judge or master before whom he has been produced.

Witnesses to be examined *viva voce* before the judge or master.

SEC. 7.—The witnesses to verify the petition are to be produced before the judge, or master, as the case may be; and are to be examined *viva voce* as to the matter of the petition, and the depositions so taken are to be stated to have been taken under this order.

Masters to examine infants and witnesses, without special order.

SEC. 8.—The masters of the court are authorised to examine infants and witnesses under this order, without special order or reference.

SEC. 9.—Upon a petition so verified the court may either grant the relief prayed at once, or make such order as to further evidence, or otherwise, as the circumstances of the case may require.

RECEIVERS.

Receivers, how appointed.

XXXVIII. (h) Receivers are to be appointed in the following manner: the party prosecuting the order for a receiver is to obtain an appointment or a warrant from the judge or master, and to serve the same on all necessary parties, naming in the copy thereof served the proposed receiver and his sureties; at the time appointed

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the party prosecuting the order is to bring into the judge's chambers, or the master's office, the recognizance or bond proposed as security: (1) the bond or recognizance is to be to the master; any other party desirous of proposing another person as receiver, is to serve notice of his intention so to do upon the other parties, naming in such notice the person proposed by him as receiver and his sureties, and is then in like manner to bring into the judge's chambers or master's office the recognizance or bond proposed by him as security: at the time named in the appointment or warrant the judge or master is, in the presence of the parties, or those who attend, to consider of the appointment of the receiver and to determine respecting the same; and to settle and approve the proposed security; the master is to make no report approving of or appointing the receiver; but the judge or master is to appoint such receiver by signing a written appointment to the following effect, viz.: "IN CHANCERY, [*style of cause*]-I hereby appoint [*receiver's name*] receiver in this cause, [*signature of judge or master*];" which appointment is to be signed without any warrant or attendance for that purpose: when signed it is to be filed by the party who has procured the person named by him as receiver to be appointed, and is then to have the same effect as the filing of the master's report appointing the receiver now has; but the same is not to be filed until after the execution and filing of the securities settled and approved by the judge or master.

Attendance.

Securities.

Counter proposal.

Appointment of receiver and settling security.

Filing of appointment.

(k) A receiver duly appointed by the court is, from the moment of his appointment, to be considered as an officer of the court itself. He will be protected by it in the proper discharge of the necessary duties of his office, the possession of the receiver not being permitted to be disturbed without the special leave of the court; (*Brooke v. Greathed*, 1 J. & W. 178; *Angel v. Smith*, 9 Ves. 335;) and it will be considered as a contempt of court if any such interference takes place. (*Broad v. Wickham*, 4 Sim. 511; *Johnes v. Cloughton*, Jac. 573.) The reason for this is explained by Lord Eldon in *Angel v. Smith*, *supra*. Even a receiver appointed to get in property, part

of which he finds in the possession of another receiver, should not take proceedings to deprive the latter of such possession without the authority of the court. (*Ward v. Swift*, 6 Hare, 312; *Tink v. Rundle*, 10 Bea. 318.)

The general objects sought by the appointment of a receiver, are to provide for the safety of property, pending litigation, and until the hearing of the cause; (*Tullett v. Armstrong*, 1 Keen, 428;) or, during the minority of infants, to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or persons having immediate but partial interests therein. A defendant seeking to appoint a receiver before decree must file a cross bill. (*Grote v. Bury*, 1 W. R. 92.)

A receiver cannot be appointed before decree on the motion of a defendant, even though he be the co-executor of the plaintiff, and the bill charges that a receiver is necessary; (*Robinson v. Hadley*, 11 Bea. 614;) nor at the hearing, on the application of the defendant, unless prayed for by the bill. (*Barlow v. Gains*, 8 Bea. 329.)

A receiver will, in a proper case, be granted before answer; (*Duckworth v. Trafford*, 18 Ves. 283; *Aberdeen v. Chitty*, 3 Y. & C. Ex. 379;) and in a case of urgency at the earliest institution of the suit; (*Meaden v. Sealey*, 6 Hare, 620; *Hart v. Tulk*, 6 Hare, 611; *Tanfield v. Irvine*, 2 Russ. 149;) and leave to serve notice of motion therefor will be given. Where the defendant sought to, and absconded for the purpose of avoiding service, a receiver was appointed on an *ex parte* motion for that purpose. (*Dowling v. Hudson*, 14 Bea. 428, where all the authorities are cited.) Otherwise, if the defendant has not absconded. (*Caillard v. Caillard*, 25 Bea. 512.)

As already stated a receiver may be appointed *before* answer, on motion and notice where fraud or danger to the property is apprehended, the affidavits of the respondent on showing cause having been considered as tantamount to an answer for this purpose. (*Jervis v. White*, 6 Ves. 739.) It is unusual, however, to move for a receiver before answer; but in strong cases it has often been done. (*Vaun v. Barnett*, 2 Bro. C. C. 158; *Dawson v. Yates*, 1 Bea. 301; *Lloyd v. Passingham*, 18 Ves. 59; *Duckworth v. Trafford*, *supra*; *Metcalf v. Pulvertoft*, 1 V. & B. 180; *Davis v. The Duke of Marlborough*, 2 Sw. 108; *Woodyatt v. Gresley*, 8 Sim. 180; *Tanfield v. Irvine*, 2 Russ. 149; *Meaden v. Sealey*, 6 Hare, 620.) Where, however, facts not founded on allegations in the bill are introduced into affidavits in support of an application for a receiver, the court will disregard them. (*Dawson v. Yates*, 1 Bea. 301.)

At any time *after* answer, if a sufficient case is made by the bill, and sufficient admissions contained in the answer, (*Boddington v. Woodley*, 8 Sim. 167,) an application for a receiver will be entertained. (*Lancashire v. Lancashire*, 9 Bea. 120.) In *Hiles v. Moore*, 15 Bea. 175, a receiver was appointed *after* decree on the petition of a defendant against his co-defendant, the application having been supported by the plaintiff, and a receiver having been specially prayed for by the bill. See also *Barlow v. Gains*, 8 Bea. 329; *Edgcombe v. Carpenter*, 1 Bea. 171.

A receiver, though not specially prayed for by the bill, may be appointed at the hearing; (*Osborne v. Harvey*, 1 Y. & C. Ch. 116;) or after decree; (*Bowman v. Bell*, 14 Sim. 392; *Brooker v. Brooker*, 3 Sm. & G. 475; *Cooke v. Gwyn*, 3 Atk. 690; but see *Fallows v. Lord Dillon*, 1 W. R. 101;) but not before decree. (*Fare v. Clegg*, 9 W. R. 216; 3 L. T. N. S. 648.)

It may be considered and stated as a general rule, that a receiver will not be appointed where the rights, as between the plaintiff and defendant, are doubtful, if the defendant has obtained the legal estate without fraud, and no case of danger as to the security is alleged. (*Lancashire v. Lancashire*, 9 Bea. 120.) Nor will the court interfere to take possession of property from a party who has it under a legal title, except in cases of presumed fraud or waste, (*Smith v. Collyer*, 8 Ves. 89,) and in

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RECEIVERS.

[ORDER XXXVIII., SEC. I.]

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these cases it proceeds against the legal title with reluctance, compelled by judicial necessity, the effect of fraud, clearly proved, combined with imminent danger to the property, if the possession should not be taken under the care of the court. (Wood-yatt v. Gresley, 8 Sim. 180; Mordaunt v. Hooper, Amb. 311; Stilwell v. Wilkins, Jac. 280; Huguenin v. Baseley, 18 Ves. 106.)

The application, that a receiver may be appointed, must be made to the court; (Grote v. Bing, 9 Hare, App. i.) unless to supply the vacant place of a receiver already appointed when, it seems, it may be made in Chambers. (Blackborough v. Ravenhill, 16 Jur. 1085; 20 L. T. 88.) A party to the suit may, by special leave, be appointed receiver. (Davis v. Barrett, 13 L. J. Ch. 804.)

The granting of a receiver is a matter of discretion, to be governed by a view of the whole circumstances of the case, one of such circumstances being the probability of the plaintiff being ultimately entitled to a decree. (Owen v. Homan, 3 M. & G. 378.)

The court will sometimes grant a receiver *pendente lite*. (Whitworth v. Whyddon, 2 M. & G. 52.)

As to cases where a receiver has been appointed *pendente lite*, see Andrews v. Powys, 2 Bro. P. C. 504; Knight v. Duplessis, 1 Ves. sen. 324; King v. King, 6 Ves. 172; Richards v. Chave, 12 Ves. 462; Clark v. Dew, 1 Russ. & M. 108; 1 Sim. & S. 114; Atkinson v. Henshaw, 2 V. & B. 85; Walker v. Walker, 2 V. & B. 91, n; Ball v. Oliver, 2 V. & B. 96; Jones v. Goodrich, 10 Sim. 327; Wills v. Rich, 2 Atk. 285; Walker v. Woollaston, 2 P. W. 576; Rendall v. Rendall, 1 Hare, 152; Wood v. Hitchings, 2 Bea. 289; Connor v. Connor, 15 Sim. 598; Rutherford v. Douglas, 1 Sim. & S. 111, n; Watkins v. Brent, 1 M. & C. 97; Marr v. Littlewood, 2 M. & C. 454; Palmer v. Vaughan, 3 Swan. 173; Prebble v. Bognhurst, 1 Swan. 312; Boehm v. Wood, 2 J. & W. 236.

The court will grant an order for an injunction and a receiver on the same motion, notwithstanding Lawson v. Morgan, 1 Price, 303. (Vernon v. McKinzie, 2 U. C. Jur. 40.)

A receiver will not be appointed where the party making the application has the legal right. (Mordaunt v. Hooper, Amb. 311; Lancashire v. Lancashire, 9 Bea. 120; Clark v. Dew, 1 R. & M. 109.)

As to cases where a receiver has been appointed by the court in matters affecting the estates of infants, trustees, and executors. And first as to infants; see Tait v. Jenkins, 1 Y. & C. C. C. 492; Gardner v. Blane, 1 Hare, 381; Tidd v. Lister, 5 Mad. 429; Anon, 6 Mad. 9; Anon, 1 Atk. 489, 578. Where infants are concerned, the court will not appoint a receiver without sureties, even though the persons who are competent to consent assented. (Tylee v. Tylee, 17 Bea. 583.)

Secondly as to trustees; Taylor v. Allen, 2 Atk. 213; Anon, 12 Ves. 4; Howard v. Papera, 1 Mad. 142; Hathornthwaite v. Russell, 2 Atk. 126; Browell v. Reed, 1 Hare, 484; Wilson v. Wilson, 2 Keen, 249; Palmer v. Wright, 10 Bea. 284; Brodie v. Barry, 3 Mer. 695; Bowman v. Bell, 14 Sim. 892; 14 L. J. Ch. 119.

Thirdly as to executors; Middleton v. Dodswell, 13 Ves. 266; Jones v. Pugh, 8 Ves. 71; Taylor v. Allen, 2 Atk. 213; Langley v. Hawk, 5 Mad. 46; Scott v. Becher, 4 Price, 346.

A general charge in a bill that the defendant, an executor and trustee, is committing waste on the testator's property without specifying any acts of waste is not sufficient to sustain a prayer for an injunction and receiver. (Sanders v. Christie, 1 Grant, 187.)

As to cases where a receiver has been appointed in partnership matters. And first, where there were not any articles or agreement; Featherstonhaugh v. Fenwick, 17 Ves. 298; Crawshay v. Maule, 1 Swan. 495; Littlewood v. Caldwell, 11 Price, 97; Peacock v. Peacock, 16 Ves. 49; Harding v. Glover, 18 Ves. 281; Smith v. Jeyes, 4 Bea. 508; Goodman v. Whitcomb, 1 J. & W. 589; Chapman v. Beach, 1 J. & W. 594; Oliver v. Hamilton, 2 Anst. 453.

And secondly, where there were articles of partnership entered into; Crawshay v. Collins, 15 Ves. 226; Hale v. Hale, 4 Bea. 369; Candler v. Candler, Jac. 225; Philips v. Atkinson, 2 Bro. C. C. 272; Wilson v. Greenwood, 1 Swan. 471; Bailey v. Ford, 13 Sim. 495; 12 L. J. Ch. 482; Baxter v. West, 28 L. J. Ch. 169; 32 L. T. 155; Roberts v. Eberhardt, 1 Kay, 148; 23 L. J. Ch. 201; 22 L. T. 253; 2 W. R. 126; Baxter v. West, 28 L. J. Ch. 169; 32 L. T. 155; Lane v. Sterne, 10 W. R. 555.

In a suit respecting partnership lands the court will not appoint a receiver as to property not proved to be partnership property. And where there is a reference to enquire what lands are partnership property, a motion for a receiver must be deferred until after report. (Bates v. Tatham, 5 U. C. L. J. 40, 41.)

As to cases between vendor and purchaser; Free v. Hinde, 2 Sim. 7; Dawson v. Yates, 1 Bea. 301; Pritchard v. Fleetwood, 1 Mer. 54; Hall v. Jenkinson, 2 V. & B. 125; Stitwell v. Williams, 6 Madd. 49; on appeal (confirmed), Jac. 280; Stratton v. Davidson, 1 Russ. & M. 484; Tanfield v. Irvine, 2 Russ. 149; Holmes v. Bell, 2 Bea. 298.

The mortgagee of an undivided share may, in a suit for foreclosure and partition, obtain the appointment of a receiver of his undivided share. (Fall v. Elkins, 9 W. R. 861.) But a receiver will not, as a general rule, be appointed at the instance of a person having the legal estate, as for example a first mortgagee. (Sturch v. Young, 5 Bea. 557.)

If he has only an equitable mortgage, that is, if there be a prior mortgage, and the prior mortgagee is not in possession, the equitable mortgagee may have a receiver without prejudice to the first mortgagee's taking possession. (Berney v. Sewell, 1 J. & W. 648; Bryan v. Cormick, 1 Cox, 422.) The cases of mortgagor and mortgagee to be referred to, are, Price v. Williams, G. Coop. 81; Coward v. Chadwick, cited 2 Russ. 150; Phipps v. Bishop of Bath and Wells, 2 Dick. 608; Dalmer v. Dashwood, 2 Cox, 378; Smith v. Earl of Effingham, 7 Bea. 357; Tanfield v. Irvine, 2 Russ. 149; Browne v. Blount, 2 R. & M. 83; Holmes v. Bell, 2 Bea. 298. In a suit for foreclosure and partition by the mortgagees of an undivided share in certain property, the court allowed a receiver to be appointed of the undivided share which belonged to the plaintiff's mortgagor. (Fall v. Elkins, 9 W. R. 861.)

As to cases in which applications have been made for the appointment of a receiver in suits arising out of the relative interests of tenants in common, and joint tenants, the cases are few; equity generally leaves the parties to their common law remedies and interferes only in cases of fraudulent exclusion from the receipt of his share of the rents and profits by the other. The general principles are well stated in Tyson v. Fairclough, 2 Sim. & S. 142; Evelyn v. Evelyn, 2 Dick. 800; Street v. Anderton, 4 Bro. C. C. 414; Milbank v. Revett, 2 Mer. 405; Hargrave v. Hargrave, 9 Bea. 549; 15 L. J. Ch. 280; Smith v. Lyster, 4 Bea. 227.

In a suit for partition of a leasehold estate, a receiver of the rents of the whole estate granted under the circumstances, Tyson v. Fairclough, *supra*, remarked upon. (Searle v. Smales, 3 W. R. 437; 25 L. T. 106.)

The court will not, at the instance of one equitable tenant in common, appoint a receiver over the whole property. (Sandford v. Ballard, 30 Bea. 109; 7 Jur. N. S. 651.)

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In the case of a breach of covenant, see *Shakel v. Duke of Marlborough*, 4 Mad. 468; in this case the defendant, on an advance of money, agreed to execute a mortgage of certain lands, but did not perform his agreement. The bill was filed for specific performance of the agreement. The court granted a receiver, observing that if the defendant had performed his agreement the plaintiff would have been entitled to bring ejectment. See also *Free v. Hinde*, 2 Sim. 7.

As to who may be appointed receiver.—See *Attorney-General v. Day*, 2 Mad. 246; *Rigge v. Bowater*, 3 Bro. C. C. 365; *Sykes v. Hastings*, 11 Ves. 363; *Scott v. Platel*, 2 Phil. 229.

A receiver, though an officer of the court, stands in the position of trustee to all parties interested in the estate or fund, therefore the judge or master will endeavour to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship or dislike between the person proposed and those with whom he in the discharge of his duties will be likely to be brought into frequent communication; (*Simpson v. Ottawa and Prescott Railway Company*, Grant's Cham. 99; 8 U. C. L. J. 188;) where the person proposed by the plaintiff having personally a feeling of disfavour (perhaps also of suspicion and dislike) against the manager of the company, the court refused to appoint him.

A party to the suit may, by special leave be appointed receiver; (*Davis v. Barrett*, 13 L. J. Ch. 304;) but he must act without salary except by express order and consent. (*Powys v. Blagrove*, 18 Jur. 462; *Hoffman v. Duncan*, 18 Jur. 69; *Baylies v. Baylies*, 1 Coll. 548.) See also *Fingal v. Blake*, 2 Moll. 60.

A solicitor in the cause cannot be appointed the receiver; (*Garland v. Garland*, 2 Ves. 187;) the next friend of infant plaintiffs will not be permitted to act as receiver; (*Stone v. Wishart*, 2 Mad. 64;) nor the son of a next friend; (*Taylor v. Oldham*, Jac. 527;) nor a trustee; (*Anon*, 3 Ves. 516;) except in a special case and without salary; (*Sutton v. Jones*, 15 Ves. 584; *Sykes v. Hastings*, 11 Ves. 363; *Banks v. Banks*, 14 Jur. 659;) the receiver should be a person wholly disinterested in the subject matter of the suit.

The order for the receiver having been pronounced by the court, directs "that the Master do appoint a proper person to be receiver of the rents and profits of the real estate, and also of the personal estate, (as the case may be,) &c., and is to allow him a reasonable salary, &c.; such person, so to be appointed, first giving security to be approved of by the master, &c." It may be observed that the master is to appoint, not to approve. As to fitness of receiver see *Wilkins v. Williams*, 3 Ves. 588; *Bowersbank v. Colasseau*, 3 Ves. 164, 166; *Tharpe v. Tharpe*, 12 Ves. 317; *Lespinasse v. Bell*, 2 J. & W. 486.

The appointment of a receiver is in the discretion of the Master, who need not state his reasons; (*Thomas v. Dawkin*, 1 Ves. 452;) the Master's judgment is conclusive in appointing a receiver, unless some substantial objection is shown; (*Garland v. Garland*, 2 Ves. 187;) nor will the court interfere unless upon special grounds and a strong case; (*Bowersbank v. Colasseau*, 3 Ves. 164;) the court will not control the Master's appointment, without special grounds; (*Anon*, 3 Ves. 515; *Wilkins v. Williams*, 3 Ves. 588; *Tharpe v. Tharpe*, 12 Ves. 317; *Wynne v. Lord Newborough*, 15 Ves. 283.)

The Court of Appeal will not entertain an appeal upon the question of the appointment of a receiver. (*Ley v. Ley*, 27 L. T. 267.)

As to the recognizance, see *Gardner v. Blane*, 1 Hare, 381; *Ridout v. Earl Plymouth*, 1 Dick. 68; *Countess of Carlisle v. Lord Berkley*, Amb. 599; *Donovan v. Thompson*, 1 Hog. 150.

As to the powers of a receiver and generally see Daniell's Ch. P. 1004, 1007; *De Winton v. Mayor, &c.*, of Brecon, 26 Bea. 588.

The general duties of a receiver may also be gathered from the following cases: *Green v. Green*, 2 Sim. 894; *Reid v. Middleton, Turner & R.* 455; *Dresser v. Morton*, 2 Phil. 285; *Dove v. Dove*, 2 Dick. 617; *Jolly v. Arbuthnot*, 5 Jur. N. S. 689; 28 L. J. Ch. 547; *Whitley v. Lowe*, 25 Bea. 421; affirmed on appeal, 2 DeG. & J. 704; *Brandon v. Brandon*, 5 Jur. N. S. 256; 28 L. J. Ch. 147.

As to suing by receiver.—Where a receiver finds it necessary to sue in order to collect debts due to the estate, the proper course is to apply for permission, showing what accounts, &c., are due and (by an affidavit of the receiver) that it is advisable to take proceedings to collect, in which case permission would be given if it would be for the benefit of the estate to incur costs in enforcing claims; (*Thomas v. Torrance, Grant's Cham.* 9;) in which case an application, not conforming to the practice as laid down above, was refused, though both parties concurred.

The receiver should apply for leave to distrain; (*Shelly v. Pelham*, 1 Dick. 120; *Hughes v. Hughes*, 3 Bro. C. C. 87; *Brandon v. Brandon*, 5 Mad. 473;) and if he defends a suit brought against him by a party to the cause, without the sanction of the court, he will not be entitled to be reimbursed his costs if he fails; (*Swaby v. Dickon*, 5 Sim. 629;) but he will be entitled to the assistance of the court in recovering from such party the costs of the action. (*Bristowe v. Needham*, 2 Ph. 190.)

Care should be taken to describe the property correctly in the order. (*Crow v. Wood*, 13 Bea. 271.) A receiver is appointed for the benefit of all parties; (*Faulkner v. Daniel*, 3 Hare, 204;) and he will not be discharged merely on the application of the party on whose application he was appointed; (*Faulkner v. Daniel, supra*; *Largan v. Bowen*, 1 Sch. & Lef. 296; *Davis v. Duke of Marlborough*, 2 Sw. 108;) all parties are bound by his possession; (*Neate v. Pink*, 3 M. & G. 476;) and if any loss arises from his default the estate must bear it. (*Hutchinson v. Massareene*, 2 Ball. & B. 55.) He is not allowed to make interest on balances in his hands. (*Shaw v. Rhodes*, 2 Russ. 539; *Drever v. Maundesley*, 8 Jur. 547; *Earl Lonsdale v. Church*, 3 B. C. C. 41.) So he will be answerable for losses if he places the money in improper hands. (*Knight v. Lord Plymouth*, 3 Atk. 480; *Salway v. Salway*, 4 Russ. 60; *Wren v. Kirton*, 11 Ves. 377.)

The possession of the receiver cannot be disturbed without the leave of the court. (*Randfield v. Randfield*, 1 Drew. & Sm. 310.)

Where an order is made upon a receiver for payment of a sum of money, the court on default will commit for a contempt of such order without requiring any further order to be served. (*McIntosh v. Elliott*, 2 Grant's Ch. R. 396.)

(2) The security usually required is the recognizance of the receiver, together with two sureties, for double the amount of the annual income. (*Mead v. Lord Orrery*, 3 Atk. 237.) In certain cases, but very rarely, except by consent, a receiver is appointed without security. If parties not competent to consent are interested, security must always be given. (*Tylee v. Tylee*, 17 Beav. 583.) The sureties must be resident within the jurisdiction; (*Cockburn v. Raphael*, 2 S. & S. 453;) and are liable for interest as well as the receiver; (*Dawson v. Raynes*, 2 Russ. 466;) and for costs of proceedings against receiver, and to appoint a new one. (*Maunsell v. Egan*, 3 J. & Lat. 251; *Re Lockey*, 1 Ph. 509.) As to their lien on the receiver's property. (*Brandon v. Brandon*, 7 W. R. 250.)

As to the allowance to the receiver, this depends on the degree of difficulty in connection with his duties. (*Day v. Croft*, 2 Beav. 488.) The usual allowance is

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five per cent. But for extraordinary trouble and expenses an additional allowance may, by express order, be made to him. (*Potts v. Leighton*, 15 Ves. 276; *Re Ormsby*, 1 B. & B. 189; and *Malcolm v. O'Callaghan*, 3 M. & Cr. 52.)

The following cases may also be referred to as to the salaries and allowances to receivers. (*Marr v. Littlewood*, 2 M. & C. 454; *Forrest v. Elwes*, 2 Mer. 68; *Sykes v. Hastings*, 11 Ves. 363; *Wilson v. Greenwood*, 1 Sw. 471, 484; *Buckmaster v. Buckmaster*, 28 L. J. Ch. 564; *Shore v. Shore*, 4 Drew. 501; 28 L. J. Ch. 940.)

As to the mode of passing his account.—The receiver having brought in a debtor and creditor account of his receipts and disbursements for the year, verified by affidavit, (for form of account and affidavit see the Book of Forms, Part the Second,) a warrant is taken out to proceed on and to pass the account and to settle the report, and served. On its return he produces all necessary vouchers and receipts for all sums above 40s. expended by him on account of the estate. On the account being passed the master makes his report in the usual way. A receiver who fails to bring in his account according to the time prescribed, may be compelled to do so. A warrant may be taken out and served that he do bring in his account, and if default be made, the Master will grant his certificate on which a motion may be made for orders *nisi* and absolute in manner hereinbefore laid down. (Page 103, *supra*.) On the order absolute being obtained the receiver may be committed for contempt or his recognizance put in suit. (*Davies v. Cracraft*, 14 Ves. 143.)

The application that the receiver may pass his accounts should be made by motion, and it may be made though the bill has been dismissed. (*Pitt v. Bonner*, 5 Sim. 577.)

The application to discharge the receiver and vacate his recognizance is made by motion in Chambers, or the direction may be given in the decree or order on further directions, and the recognizance will be vacated on a proper affidavit of payment to the party entitled to receive the balance, or upon the certificate of payment into court. A receiver is entitled to the costs of his application to be discharged. (*Richardson v. Ward*, 6 Mad. 266.)

The court will entertain a motion to discharge an order for a receiver though such order was made on notice. (*Sanders v. Christie*, 1 Grant, 187.)

SEC. 2.—Committees of the persons and estates of lunatics, idiots, and persons of unsound mind, and guardians, excepting guardians *ad litem*, are to be appointed in the same manner as nearly as circumstances will permit. (m)

(m) See Consolidated Statutes of Upper Canada, pp. 52–55, and notes thereon, *infra*.

The provisions of Con. Stat. U. C., cap. LXXIV., sec. I., p. 795, giving power to the surrogate judge to appoint guardians to infants, have not the effect of excluding the jurisdiction of the Court of Chancery in respect of the appointment of such guardians. (*In re Stannard*, Grant's Cham. 15.)

Although the court is in the habit of paying respect to the wishes and directions of a testator in reference to the care and guardianship of his children, it will not do so at the expense of their happiness or moral training. (Anon, 6 Grant, 632.)

The court will not appoint a guardian where incapacity of defendant arises from age and illness. (*Steel v. Cobb*, 11 W. R. 298.)

NOTICE OF MOTION. (n)

XXXIX. A notice of motion by any party to the suit may be served at any time after bill filed, without the leave of the court, except when the contrary has been expressly provided. (o)

Notice of motion may be served at any time after bill filed, without leave.

(n) Notwithstanding this order a motion may be made *ex parte*, in very pressing cases, where otherwise notice could have been given, as in the case of an injunction, "where the threatened mischief is imminent and would be irremediable." But as a general rule, every application which is not of a very urgent nature, or authorized by some general order or practice to be made *ex parte*, or from the nature of the case incapable of being made on notice, should be made upon notice. Applications for or to dissolve injunctions, and for receivers, are made to the court; applications for the appointment of guardians *ad litem*; to dismiss bill for want of prosecution; to stay proceedings pending appeal; for substituted service, for production, or to commit for non-production; to discharge orders for irregularity; to pay money into court; are made in Chambers.

A married woman or infant moves by next friend. (Pearse v. Cole, 16 Jur. 214; Pidduck v. Boulton, 2 Sim. N. S. 223.)

A party who has not joined in the notice cannot, as a general rule, be heard in support of a motion to discharge an irregular order. (Stubbs v. Sargon, 3 Bea. 408; Jaquet v. Jaquet, 7 W. R. 543.)

By Order of court dated 9th May, 1862, it is provided as follows:—"A notice of motion to set aside any proceeding for irregularity must specify clearly the irregularity complained of."

The notice, if made in a cause, must state the names of the parties fully and correctly; (Davis v. Barrett, 7 Bea. 171; Rowlatt v. Cattell, 2 Haie, 186; Pollard v. Doyle, 2 W. R. 509;) and it must distinctly state what the party moving wishes to obtain. (Daniell's Ch. Pr., 8rd edit., 1196.)

The misnomer of a party in the affidavit of service will be a ground for discharging the order made thereon, (Salomon v. Stalman, 4 Bea. 243.)

Several objects may be included in the same notice of motion, *ex. gr.*, the appointment of a receiver and an injunction. Where separate motions are made for two objects, which might and ought to have been obtained by one motion, the practice is material on the question of costs. (Hawke v. Kemp, 3 Bea. 288; Daniell's Ch. Pr., 8rd edit., 1196, 1197.)

Where an executor after decree, or decretal order, moves to restrain three different creditors who have commenced different actions against him from proceeding therewith, there must be a separate notice of motion for each creditor. (Moseley v. Moseley, 9 W. R. 531.)

Costs may be given though not asked for by the notice of motion; (Clark v. Jaques, 11 Bea. 623; Butler v. Gardener, 12 Bea. 525; Dawson v. Jay, 2 W. R. 598; Sanders v. Christie, 1 Grant, 187;) but if the party does not appear, see Pratt v. Walker, 19 Bea. 261.

An order to discharge an irregular order with costs carries the costs of an application to discharge it. (West v. Smith, 3 Bea. 492.)

Where the other side does not appear, the affidavit of service must be filed at

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latest before the rising of the court on the day on which the motion is made. (Lord Milltown v. Stuart, 8 Sim. 34.) An order made on affidavit of service must not add to, (Pratt v. Walker, 19 Bea. 261,) or depart from the terms of the notice of motion; (Hutton v. Hepworth, 6 Hare, 815;) and the order will be liable to be discharged if there be any irregularity in the notice, (Moody v. Hebbard, 11 Jur. 941,) or affidavit, (Salomon v. Stalman, 4 Bea. 248,) on which it is founded. Where the affidavit of service is imperfect, a new notice must be given. (Barton v. Chambers, 4 Bea. 547.) After order made on affidavit of service, the opposite side can only move to discharge it. (Mapp v. Elcock, 22 L. J. Ch. 707.)

(o) The leave must be stated in the notice of motion. (Hill v. Rimell, 2 M & Cr. 641.) Leave may be given to serve notice of motion for an injunction with the bill, but not before the bill is filed; (Simmons v. Heavyside, 22 Beav. 412;) and as to short notice of motion, see Hart v. Tulk, 6 Hare, 611.

SEC. 2.—There must be at least two clear days between the service of a notice of motion, and the day named in the notice for hearing the motion, unless the court give special leave to the contrary; and there must be two clear days between the service of the petition and the day appointed for hearing the same; and in the computation of such two clear days, Sundays, or days on which the offices are closed, are not to be reckoned. (p)

There must be two clear days between service of the notice and time for hearing the same.

(p) A notice of motion given for a day which is not a regular court day, unless leave of the court be obtained for that purpose, is a void proceeding, and the party served need not attend thereon. (Stevenson v. Huffman, 4 Grant's Chan. Rep. 818; 1 U. C. L. J. 170.) If leave be given, it must be stated in the notice of motion. (Hill v. Rimell, *supra*.)

Where a notice of motion had been given for Good Friday, the court refused to entertain the motion at the next sitting. (Fitzgerald v. Phillips, 3 Grant's Chan. Rep. 585.)

EVIDENCE UPON MOTIONS, PETITIONS, AND INTERLOCUTORY PROCEEDINGS.

XL. Admissions of the service of a notice of motion or other paper, upon the opposite solicitor, need not be verified by affidavit. Admissions of service by a solicitor need not be verified by affidavit.

SEC. 2.—All the affidavits upon which any notice of motion is founded must be filed at the time of the service of such notice of motion; and the affidavits either in which a notice is founded are to

MOTION; EVIDENCE ON.
[ORDER XL., SEC. III. AND IV.]

be filed at the time the notice of motion is served. support of, or in opposition to any special motion or petition, are to be filed, as heretofore, with the registrar. (q)

(q) This section applies to all suits, and that, too, whether the bill has been filed in the office of a Deputy-registrar, or in the office of the Registrar, at Osgoode Hall.

If a party gives notice of his intention to read an affidavit, but declines to do so, the other side may read it; (*Cauty v. Houlditch*, 14 Sim. 75;) and it cannot be withdrawn. (*Clarke v. Law*, 2 K. & J. 28.) Notice to use an affidavit filed on a former occasion is necessary.

Affidavits cannot be used on a motion where notice of intention to read them has not been given in the notice of motion. (*Farish v. Martyn*, 1 Grant, 800.) Nor (except by leave) unless they were filed before, or contemporaneously with the service of the notice of motion as directed by this section.

The original affidavits may be read on the hearing in lieu of office copies.

SEC. 3.—(r) Original affidavits may be used on the hearing of any matter, instead of office copies.

(r) Section 3 of this order is repealed, by Orders promulgated on the 29th day of June, 1861. This order is as follows:—

“AFFIDAVITS ON APPLICATIONS TO COURT.

Section 3 of General Order No. XL. is hereby abolished, except as to affidavits in support of *ex parte* applications; but this order is not to be taken to warrant the taxation of the costs of obtaining office copies of affidavits for use upon the hearing of any matter, by the party on whose behalf they are filed.

Affidavits, except upon *ex parte* applications, must be filed before they can be used; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion.”

It is proper to again refer to the Order of court promulgated on the 10th day of July, 1861, with reference to affidavits, it is as follows:

“Each statement in an affidavit, which is to be used as evidence at the hearing of a cause or matter, or of a motion for a decree or other motion, or on any proceeding before the court, (or before the judge in chambers,) shall shew the means of knowledge of the person making such statement.”

Office copies of affidavits and pleadings to be made by solicitors,

SEC. 4.—Any party who requires an office copy of an affidavit to be used upon any application is to demand the same from the solicitor of the party by whom such affidavit has been filed, or on whose behalf it is to be used, and such copy is to be ready for delivery within

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forty-eight hours from the time of such demand, or within ^{and ready for delivery within} such other time as the court may in any case direct (s.) ^{forty-eight hours.}

(s) See Order XLIII., sec. 4:—"Any further time which may elapse before the delivery thereof is not to be computed against the party demanding the same."

SEC. 5.—All affidavits are to be taken and expressed ^{Affidavits are to be taken in the first person of the deponent,} in the first person of the deponent, and his name at the commencement of the affidavit is to be written in full, and not designated by any initial letter merely. (t)

No costs are to be allowed in respect of any affidavit ^{otherwise no costs to be allowed.} which has not been drawn in conformity with this section.

(t) See English act, 15 & 16 Vic., ch. 86, sec. 40.

See also Order of court promulgated on the 18th day of April, 1859. Sec. 4, "Every bill and answer filed, and every affidavit to be used in any cause or matter, shall be written in a plain legible hand, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any bill, answer or affidavit, or part of any bill, answer or affidavit, substantially violating this order; nor shall any affidavit violating this order be used in support of, or opposition to any motion, without the express permission of the court."

An affidavit if made in a suit must be correctly entitled in the suit. (May v. Prinsep, 11 Jur. 1032; Salomon v. Stalman, 4 Beav. 243.) The affidavit must be signed by the party making it. A marksman ought to sign his name at full length, though his hand be guided. (— v. Christopher, 11 Sim. 409.)

As to the form of affidavits, see Book of Forms, Part the Second. Sums must be stated in words. (Crook v. Crook, 1 Jur. N. S. 654.) Documents referred to in affidavits, if not set out at length, must be made exhibits. (Hewetson v. Todhunter, 2 Sm. & G. App. ii.)

The omission of the words "make oath" in the affidavit makes it inadmissible. (Phillips v. Prentice, 2 Hare, 542; Re Newton's Will, 2 DeG. F. & J. 8; 8 W. R. 425; 2 L. T. N. S. 342.)

As to description of deponent, see Boddington v. Woodley, 12 L. J. Ch. 15.

SEC. 6.—Every affidavit is to be read over to the deponent by the master or examiner who is required to administer the oath; and the master or examiner is to ^{Master, &c., is to inform every deponent that he is liable to cross-examination,}

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inform such witness that he is liable to be cross-examined touching the matter of such affidavit; and when the witness desires to qualify or add to his deposition, the master or examiner is to vary the same accordingly; and the jurat is to be in the form or to the effect set forth in schedule P. to these orders. (u)

(u) Schedule P. is as follows:—

SCHEDULE P.

"JURAT OF AFFIDAVIT.

Sworn before me, at ———, on the ——— day of ———, having been first read over to the deponent C. D., whom I informed that he was liable to cross-examination as to its contents, and that he was at liberty to add to or vary the same."

In affidavits of execution of bonds and like documents produced for approval of the court, the ordinary common law jurat is sufficient. (Re Aulsebrook, 4 Grant, 109.) So also in affidavits of the service of papers.

An affidavit purporting to be sworn before the mayor of a city in England is inadmissible in the Court of Chancery of Upper Canada without proof of his signature and authority to administer oaths, but where sworn out of England, such an affidavit would be receivable under Imp. Stats. 14 & 15 Vic., cap. 99, and 15 and 16 Vic., cap. 86. (Graham v. Macpherson, Grant's Cham. 85.)

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give evidence
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petition or motion,
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And any witness
who has made an
affidavit to be
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pelled to attend
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SEC. 7.—Any person in any cause or matter depending may, by a writ of *subpoena ad testificandum*, or *duces tecum*, require the attendance of any witness before the court, or before a deputy master, or examiner specially appointed for the purpose, (v) examine such witness orally for the purpose of giving his evidence upon any motion, petition, or other proceeding (vv) before the court, in like manner as he may now require such witness to attend and be examined with a view to the hearing of the cause; and any party having made an affidavit to be used, or which shall be used on any motion, petition, or other proceeding before the court, shall be bound to attend for the purpose of being cross-examined, on being served with such writ; (w) but the court, nevertheless, in its discretion, may act on the

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evidence before it at the time, and may make such *interim* order, or otherwise, as may appear necessary to meet the justice of the case.

The court may make interim orders.

(v) The special examiners are two in number. The examination generally takes place in the examiner's office. The examiner is bound to take the depositions down in his own hand-writing. (*Stobart v. Todd*, 23 L. J. Ch. 956; 18 Jur. 618; 2 W. R. 617.) He has no power to determine questions as to the adverse nature of the evidence of a witness. (*Buckley v. Cooke*, 1 K. & J. 29; 24 L. J. Ch. 24.) In such cases the questions, as well as the answers of the witness, should be put down by the examiner. (*Ibid*; *Wright v. Wilkin*, 4 Jur. N. S. 804; 6 W. R. 648.) The examiner may admit the public if he think fit. (*Wright v. Wilkin*, *supra*.)

(vv) A creditor who has made an affidavit as to his claim in an administration suit is within the section. (*Cast v. Poyser*, 3 Sm. & G. 369; 26 L. J. Ch. 98; on appeal 353; 3 Jur. N. S. 38.) But a defendant who, at the plaintiff's instance, has made an affidavit as to documents in his possession, is not liable to cross-examination on such affidavit. (*Manby v. Bewicke*, 26 L. J. 20; 4 W. R. 757; over-ruling *Kay v. Smith*, 20 Bea. 566.)

The plaintiff, on a motion for an injunction which has by consent of court been turned into a motion for a decree, may cross-examine a defendant on his answer. (*Wightman v. Wheelton*, 23 Bea. 397; 3 Jur. N. S. 124.)

A defendant who had not submitted to be cross-examined upon his answer was not allowed to read it in opposition to a motion for an injunction. (*Wightman v. Wheelton*, 23 Bea. 397; 3 Jur. N. S. 124; 5 W. R. 337; 28 L. T. 316.) *Query*, can the plaintiff cross-examine the defendant on such answer unless the latter intends to use it. (*Ibid*; *Abadom v. Abadom*, 24 Bea. 248; *Rehden v. Wesley*, 26 Bea. 432.)

(w) A motion that a solicitor might produce his client before the examiner; or in the alternative for substituted service of a *subpoena ad testificandum* was refused with costs. (*Spicer v. Dawson*, 22 Bea. 282.) A witness may demand to have his travelling expenses paid before attending to be examined. (*Brocas v. Lloyd*, 23 Bea. 129; 26 L. J. Ch. 758.) This rule applies to parties to suits as well as to other witnesses. (*Davey v. Durrant*, 24 Bea. 493; 27 L. J. Ch. 503; 4 Jur. N. S. 230; 6 W. R. 405; 31 L. T. 21.)

The allowance to a witness corresponds with that allowed in courts of common law. (*Nokes v. Gibbon*, 26 L. J. Ch. 208; 3 Jur. N. S. 282; *Turner v. Turner*, 7 W. R. 578; 5 Jur. N. S. 839.)

A witness may be examined twice over. (*Wood v. Scarth*, 24 L. J. Ch. 392.)

A defendant may cross-examine his co-defendant's witnesses, all the evidence in the suit being open to all parties to it; (*Lord v. Colvin*, 8 Drew. 222; 24 L. J. Ch. 517; 1 Jur. N. S. 298; *Sturgis v. Morse*, 26 Bea. 562; *Powys v. Blagrove*, *Kay*, 495;) and as to the order of cross-examination where there are several cross-examining parties. (*Harrison v. Mayor, &c.*, of Southampton, 2 Jur. N. S. 485.)

A witness when cross-examined on his affidavit, has no right, it seems, to insist that the paragraphs in his affidavit on which he is cross-examined should be shewn to him before he answers the question. (*Gwynne v. Watney*, 31 L. T. 231.) This rule is not followed very strictly in practice.

In the court in this province the obligation to produce the witness lays on the cross-examining party. It is different in England under 19th Rule of Order of February 5th, 1861. Here the attendance must be enforced by subpoena, see *Winthrop v. Elderton*, 1 W. R. 318; *Spicer v. Dawson*, 22 Bea. 282; *Keymer v. Pering*, 10 Sim. 179. The cross-examination may take place immediately after the affidavit is filed. (*Clarke v. Law*, 2 K. & J. 28; 2 Jur. N. S. 228; 4 W. K. 85.) Where a document is referred to in an affidavit, it will be ordered to be produced, in order to enable a proper cross-examination to be had thereon. (*Bell v. Johnson*, 1 Jo. & H. 682; 4 L. T. N. S. 637.)

A defendant may be examined *viva voce* in support of a motion, notice of which has been given, although the time for answering has not elapsed. (*McClennaghan v. Buchanan*, 7 Grant's Ch. R. 92.) The notice of motion must have been previously given. (*Ibid.*)

As to production of papers under a subpoena duces tecum.—The rule that a solicitor is bound to produce documents under a subpoena *duces tecum* subject to any lien he may have on them, does not apply where the person asking their production is the party to pay the amount claimed. (*Moodie v. Thomas*, Grant's Cham. R. 19; *Kemp v. King*, 2 Moo. & R. 437; *Hope v. Liddell*, 24 L. J. Ch. 691.)

Where a witness is to be examined, for the purpose of a motion, &c., forty-eight hours' notice of the examination is to be given to the opposite party.

SEC. 8.—Any party in any cause or matter who requires the attendance of any witness, whether a party to the cause or matter, or not, for the purpose of his being examined with a view to his evidence upon any motion, petition, or other proceeding before the court, *not being the hearing of a cause*, is to give to the opposite party or parties, forty-eight hours' notice, at least, of his intention to examine such witness and of the time and place of such examination, unless the court think fit in any case to dispense with such notice. (x)

(x) This section is the same as the English Order No. XXXVI., of the 7th August, 1862, which has been abrogated in England by subsequent Orders of 5th Feb., 1861.

The cross-examination of witnesses, examined for the purpose of a motion, is to follow immediately upon the examination.

The cross-examination, in such case, is to follow immediately upon the examination, and is not to be deferred to any future time. (y)

(y) The cross-examination may, it seems, take place immediately after the affidavit is filed. (*Clarke v. Law*, 2 K. & J. 28.)

SEC. 9.—Where it is desired to cross-examine any

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EXAMINATION PRO INTERESSE SUO ABOLISHED.
[ORDER XLI., SEC. I., II., III., AND IV.]

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witness, whether a party to the cause or matter, or not, who has made an affidavit to be used, or which has been used upon any motion, petition, or other proceeding before the court, *not being the hearing of the cause*, the party who desires to cross-examine such witness is to give forty-eight hours' notice to the party on whose behalf such affidavit was filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party, if he think fit, may be present at such intended cross-examination. (2)

Forty-eight hours' notice of the cross-examination of a witness who has made an affidavit, to be given to the opposite party.

(2) This section is the same as the English Order No. XXXVII., of the 7th August, 1852, which has been abrogated in England by the subsequent Orders of 5th Feb., 1861.

EXAMINATION PRO INTERESSE SUO ABOLISHED.

XLI. The practice of applying to the court for an order to be examined *pro interesse suo* is hereby abolished. Examination *pro interesse suo*.

SEC. 2.—In lieu thereof, any party who might have moved to be examined *pro interesse suo* may apply to the court, upon motion, for such relief as he may think himself entitled to. (a) Proceedings in lieu of present practice.

(a) See Daniell's Chancery Practice, 3rd ed., pp. 824-827.

SEC. 3.—Motions under this order are to be governed by the practice prescribed by the sixteenth order, in relation to motions for a decree.

SEC. 4.—On hearing the motion, the court, in its discretion, may either grant or refuse the motion, or it may give such directions for the examination of parties or witnesses—or for the making further enquiries—or for the institution of any suit or action, as the circumstances of the case may require.

SEC. 5.—When it can be made to appear to the court that it would be conducive to the ends of justice to permit a notice to be served for some day earlier than that prescribed by the 16th order, leave may be obtained for that purpose, upon an *ex parte* application to a judge at chambers in the manner prescribed by the 17th order.

THE MASTER'S OFFICE. (b)

XLII. Every decree or order referring any matter to the master is to be brought into his office within fourteen days after the decree or order shall have been pronounced, by the party having the carriage of the same; otherwise any other party to the cause, or any party having an interest in the reference, may apply to the court as he shall be advised, that the prosecution of such decree or order may be committed to him, or otherwise, for the purpose of expediting the prosecution thereof. (c)

Bringing in decree or order of reference.

(b) The Master has no power to dispense with or to relax the general orders of the court. (Smith v. Webster, 3 M. & C. 244; 1 Jur. 914.)

Proceedings in the Master's office, amount to proceedings in the court itself. What is carried in before the Master, is carried in before the court, of which the Master's office is part. (Erskine v. Garthshore, 18 Ves. 114.)

If the Master does not decide at the time of considering the decree to admit affidavits as evidence, he cannot afterwards receive them, except by consent. (Gibbs v. Payne, 4 Sim. 554; 3 L. J. Ch. 40.)

(c) Adapted from the 48th of the English Orders of 1828. Before a decree can be taken into the Master's office it must be passed and entered. Any proceedings taken under it before passing and entry being irregular and voidable. (Tolson v. Jervis, 8 Beav. 364.)

It would seem that the party in whose favour judgment is given has the *prima facie* right to carry the decree into the Master's office, as he would be most interested in prosecuting it expeditiously. The party carrying in the decree makes a fair copy of it, which the Master's clerk examines with the original decree. The copy is then filed with the Master, the solicitor retaining the original, except in the case of a sale under a decree, when the original decree and order are to be left with the Master, if required. (Order XXXVI., sec. 1, *supra*.)

Where the plaintiff, in a creditor's suit, delays in prosecuting the decree, the court will give the carriage of it to another creditor on his indemnifying the plaintiff against future costs. (Patterson v. Scott, 4 Grant, 145.)

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The plaintiff desiring it, the carriage of decree was given to the defendants, they to have their costs. (*Goodeve v. Manners*, 1 U. C. L. J. 57.)

A plaintiff, though in contempt, may prosecute his decree, unless the defendant obtain an order to stay proceedings till the contempt is purged. (*Hurd v. Robertson*, Grant's Cham. 8, and cases there cited.)

SEC. 2.—Upon the bringing in of every decree or order, the solicitor bringing in the same is to take out a warrant (unless the master shall dispense therewith) appointing a time, which is to be settled by the master, for the purpose of taking into consideration the matters referred by such decree or order, and is to serve the same upon the parties, or their solicitors, unless the master shall dispense therewith; and upon the return of such warrant to consider, or upon the bringing in of the reference when no such warrant shall have been issued, the master is to proceed to regulate in all respects the manner of proceeding with such reference, and the manner in which each of the accounts and enquiries is to be prosecuted.

Directions as to mode of prosecuting reference.

As to the evidence to be adduced in support thereof, and therein to give such special directions, (a) if any, as he may think fit with respect to the mode in which any accounts referred to him are to be taken or vouched; (b) and, if he think fit so to do, to direct that in taking such accounts the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained, (c) with liberty to the parties interested to take such objection thereto as they may be advised. (d)

(a) As to special directions for taking accounts, see *Millar v. Craig*, 6 Bea. 443; *Allfrey v. Allfrey*, 10 Bea. 368.

(b) The meaning of this section is that where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the court may give special directions for the taking of such accounts, but such directions will not be given merely to save expense, or unless ordinary evidence cannot be obtained. (*Lodge v. Pritchard*, 8 DeG. M. & G. 906; before the court below, 1 Sm. & G. App. viii.; see also *Ewart v.*

Williams, 7 DeG. M. & G. 68; 24 L. J. Ch. 414; 3 Drew. 21; 24 L. J. Ch. 366; 7 DeG. M. & G. 74, 75.)

(c) As to this see *Sleight v. Lawson*, 3 K. & J. 292; *Stainton v. Carron Company*, 24 Bea. 346; *Ogden v. Battams*, 1 Jur. N. S. 791; *Newberry v. Benson*, 23 L. J. Ch. 1003; 2 W. R. 648; *Nelson v. Booth*, 3 DeG. & J. 119; 27 L. J. Ch. 782; 6 W. R. 845; *Morgan v. Higgins*, 5 Jur. N. S. 286; *Coleman v. Mellersh*, 2 M. & G. 309; *Dean v. Thwaite*, 21 Bea. 621.

(d) See *Attorney-General v. Attwood*, 9 Hare, App. lvi.; 1 W. R. 64; *Newberry v. Benson*, *supra*. See notes to Order XXXV., sec. 1, page 151, *supra*.

As to the parties who are to attend on the several accounts and enquiries.

As to the time at which, or within which, each proceeding is to be taken.

And he is to fix a time at which to proceed to the hearing and determining of such reference, appointing a day in the meantime, if he shall think fit, for the purpose of entering into the accounts and enquiries, with a view to ascertaining what is admitted and what is contested between the parties; and such directions may be afterwards varied or added to, as may be found necessary; and in giving such directions and in regulating the manner of proceeding before him, the master is to devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference, and every part thereof, and with that view to dispense with any proceedings ordinarily taken in the master's office, which he may conceive to be unnecessary; to shorten the periods for taking any proceedings, or to substitute a different course of proceeding for that ordinarily taken. Any party directed by the master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the master in that behalf, without any warrant or written direction being served upon him for that purpose. (e)

Directions may be varied.

General powers.

Directions to be observed without warrant.

(e) The Master usually dispenses with the warrant to consider, except in very special cases. If the warrant is thought necessary and issued, it should be served on

all proper parties. The practice with the Master at Toronto is to cause it to be served two clear days before it is returnable, by analogy to the service of notices of motion. In England, however, one clear day was held sufficient. (Daniell's Ch. Pr., 2nd ed., p. 1352.)

The service of warrants was dispensed with on production of an affidavit showing that the defendant could not be served. (McGill v. Knott, 1 U. C. L. J. 57.)

Where the defendant, in a foreclosure suit, was served with the first warrant and had absconded, and the subsequent warrants had been left at his residence within the jurisdiction, such service was held sufficient. (White v. Courtney, Grant's Cham. 66.)

As to who may attend.—In England, where a bill had been taken *pro confesso* against a defendant, he was not allowed to appear in the Master's office, unless he first obtained an order for that purpose; (Heyn v. Heyn, Jac. 49; see, however, King v. Bryant, 8 M. & C. 191; and Dominicetti v. Latti, 2 Dick. 588;) where it is held that a *pro confesso* defendant should be served with warrants on all proceedings affecting his interests if he had appeared; *secus* if he had not appeared. (Thompson v. Trotter, cited 8 M. & C. 193; and see Eltoft v. Brown, 2 Hare, 618.) In this Province, however, such defendant is allowed to appear in the Master's office without order, where he may object that mesne incumbrancers are not parties; (Cameron v. Lynes, Grant's Cham. 42;) or show that the amount advanced on a mortgage was less than the consideration expressed in it; (Penn v. Lockwood, 1 Grant, 547;) he cannot, however, set up usury in such a manner. (*Ibid.*) See Order XIII., sec. 7, *supra*. It is the practice with the Master at Toronto, in foreclosure or other suits, where parties are added in his office, to cause his warrant to be served upon the defendant mortgagor, though the bill be *pro confesso* against him, if he be not resident out of the jurisdiction.

Creditors, or other parties proving debts or claims, are only entitled to attend on the proceedings brought in by themselves. (Hare v. Rose, 2 Ves. Sen. 558.)

As a general rule, all persons having an interest in the result of the proceedings should have notice of the attendance before the Master.

After the decree has been considered, the Master is to make such direction as to the prosecution of the reference generally, (including the bringing in of accounts, documents, &c., and as to hearing and determining, and settling his report,) as he thinks proper, such direction should be entered in his book, (sec. 4, *infra*), and a warrant issued thereon, the underwriting of which should be a copy of the direction as contained in the Master's book.

See Order promulgated on the 29th June, 1861, as to

"APPOINTMENTS AND NOTICES IN THE MASTER'S OFFICE.

Where the Master shall direct that parties not in attendance before him shall be notified to attend before him at some future day, or for different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, to be signed by the Master, of the proceedings to be taken, and of the times by him appointed for taking the same.

In cases where parties are notified by appointment from the Master, of proceedings to be taken before him, no warrants shall be issued as to such parties in relation to the same proceedings.

Parties making default upon such appointments, are to be subject to the same consequence as if warrants had been served upon them."

MASTER'S OFFICE.—PROCEEDING ON ACCOUNTS.
[ORDER XLII., SEC. III.]

If more than one general warrant be issued, the costs of the extra warrants should not be allowed.

Bringing in accounts.—The direction of the Master to bring in an account, or do any other act, should be entered in his book, and if the party so directed be not present when the direction is made, he should be served with a warrant underwritten with the direction copied from the Master's book. Where a party so present, or served, neglects to obey the Master's direction, he can be proceeded against for a contempt, by orders *nisi* and absolute, in the same manner as for a contempt for non-production of documents, as to which see *infra*, notes to section 14 of this Order, and *supra*, pp. 108-4. Where an account has been filed, the Master is to decide whether it is a sufficient compliance with his direction, and will grant or refuse his certificate accordingly.

Costs occasioned
by improper re-
fusal to admit.

SEC. 3.—When the master shall appoint a day, as provided for in section 2 of this order, for the purpose of entering into the accounts or enquiries referred to him, with a view to ascertaining what is admitted and what is contested between the parties; and when it becomes necessary to adduce evidence, or to incur expenses otherwise, in establishing or proving items of account or other matters which in the judgment of the master ought, under all the circumstances, to have been admitted by the party sought to be charged therewith, and which such party shall refuse to admit, the master, before making his report, is to proceed to tax such costs, occasioned by such refusal, as shall appear to him reasonable and just, and shall state in his report the amount of such costs and how the same were occasioned; and the party to whom such costs are to be paid is to be entitled, upon the master's report becoming absolute, to such process of the court to compel payment thereof as in other cases; provided always, that when the party entitled to receive the general costs of the cause is the party ordered to pay such costs, he is to be at liberty to deduct such costs from such general costs, provided such general costs, and such interlocutory costs, are between the same parties. When the master shall omit to appoint a day for the purposes aforesaid, it shall be competent to him to grant to any party bringing in accounts a warrant to proceed on the same, for the purposes aforesaid; such warrant to

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be underwritten, as follows: "On leaving the accounts of, &c.; and take notice that you are required to admit the same, or such parts thereof as you can properly admit." And when the party so notified shall refused to admit the same, the like consequences shall follow, under the like circumstances, as are hereinbefore provided for. (f)

(f) Where the Master reports any thing as admitted, and the report is appealed against, the admission is taken to be *prima facie* true, and requires at least one affidavit to falsify it. (3 P. W. 142, n.)

It is prudent to have admissions signed by the party making them or his solicitor.

A solicitor cannot make an admission for an infant, lunatic, or married woman in the Master's office, any more than he can do so in any other stage of a suit.

SEC. 4.—The master and each of the deputy-masters ^{Master's book to be kept.} is to keep in his office a book, to be called the "master's book," in which, upon the bringing in of any decree or order of reference, is to be entered the style of the cause, the name of the solicitor prosecuting the reference, the date of the decree or order being brought in, and an entry of the proceedings then taken; and the master shall enter therein, from time to time, the proceedings taken before him, and the directions which he may give in relation to the prosecution of the reference, or otherwise.

SEC. 5.—No states of facts, charges, or discharges, ^{States of facts, &c., abolished.} are to be brought into the master's office. But, when directed, copies, abstracts of, or extracts from accounts, deeds, or other documents and pedigrees, and concise statements, are to be supplied; and, where so directed, copies are to be delivered as the master shall direct. No copies of deeds or documents are to be made where the originals can be brought in, without special direction. (g)

(g) Persons entitled to attend have a right to take copies of all proceedings in

writing and documents brought into the Master's office by any party to the reference. (2 Smith, 3rd Ed. 111, 112.) The practice is for any party desiring copies of such proceedings, to bespeak the same from the Master, who will thereupon supply them, charging therefor at the rate of sixpence per folio.

Form of bringing
in accounts.

SEC. 6.—Where any account is to be taken, the accounting party is, unless the master shall otherwise direct, to bring in the same in the form of debtor and creditor, verified by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto. (*h*)

(*h*) Where the account is not in the form prescribed by this section it is in the discretion of the Master to certify that it is insufficient, and the accounting party may be proceeded against for contempt in the usual way.

Surcharge—mode
of.

SEC. 7.—Any party seeking to charge any accounting party beyond what he has in his account admitted to have received, is to give notice thereof to the accounting party, stating, so far as he is able, the amount so sought to be charged and the particulars thereof in a short and succinct manner. (*i*)

(*i*) After report signed a charge or discharge will not be allowed, where, however, the report signed was erroneous and could not be acted upon, leave was given to a defendant to carry into the Master's office, and prove a charge and discharge. (Smith v. Crooks, 8 Grant, 321.)

Proceeding on
reference.

SEC. 8.—Every reference appointed to be heard as by section two of this order provided, is to be called on and proceeded with at the day and time so fixed, unless the master shall in his discretion think fit to postpone the same; and in granting any application to postpone the hearing of such reference, the master may make such order, as to the costs consequent upon such postponement, as he may think just. And as soon as the master shall have entered upon the hearing of such reference,

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he is to proceed therewith to the conclusion without interruption, where that is practicable; and when any reference cannot be concluded in a single day, the master is to proceed *de die in diem*, without any fresh warrant, unless he shall be of opinion that an adjournment other than *de die in diem* would be proper, and conducive to the ends of justice; and when any such adjournment shall be ordered, the master is to note in his book the time and reason thereof; and in no case is any matter to be discontinued or adjourned for the mere purpose of proceeding with any other matter, (with the exception of the examination of witnesses during examination terms,) unless such course shall have become necessary. (k)

(k) It is not imperative on the Master to proceed *de die in diem*, but subject to his discretion. (Purcell v. M'Namara, 11 Ves. 362.)

SEC. 9.—Upon any application made by any person to the court, the master is, at the instance of the person making the application, to certify to the court, as shortly as he conveniently can, the several proceedings had in his office in the same cause or matter, and the dates thereof. (l)

Certificate of proceedings.

(l) English Order LVII. of the Orders of 1828.

SEC. 10.—Where a party actually prosecuting a decree or order does not proceed before the master with due diligence, the master is at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim before the master under the decree or order, to commit to him the prosecution of such decree or order, and from thenceforth neither the party making default

Course where reference not prosecuted diligently.

nor his solicitor is to be at liberty to attend the master as the prosecutor of such decree or order. (m)

(m) English Order LVI. of the Orders of 1828.

Where the Master refuses an application to take the carriage of the decree from the party prosecuting the reference, the court will still exercise its authority and entrust it to another party if it see fit. (*Wyatt v. Sadler*, 5 Blm. 450; *Cook v. Bolton*, 5 Russ. 282.)

Proceeding on
claims of credi-
tors.

SEC. 11.—Advertisements for creditors are to appoint a day and hour, and to name the place at which creditors are to come in and present and prove their claims before the master; for this purpose no state of facts shall be necessary, but the claims are to be duly verified by affidavit. At the time and place named in such advertisement, the master is to proceed on the claims brought in before him without further notice, and may examine any parties as witnesses in relation thereto at such time, or thereafter, as he may see fit; and he is to allow or disallow, or adjourn the same, as to him may seem just. The cost of proving such claims are, in the discretion of the master, to be allowed to the creditors proving the same, and added to their debts respectively; or to be disallowed. And in case of their being allowed, they may be allowed in gross in place of taxed costs. (n)

(n) The creditor may be cross-examined upon his affidavit. (*Cast v. Poyser*, 26 L. J. Ch. 358.)

In allowing costs to creditors the Master is to allow to each creditor the costs of proving and attending on his own claim only. (*Hare v. Rose*, 2 Ves. Sen. 558.)

The Master should allow creditors to come in and prove at any time before he has signed his report. And the court will, after report signed, on petition supported by the affidavit of the applicant, allow a creditor to prove whilst there is any money in court; (*Lashley v. Hogg*, 11 Ves. 602;) even after a deficient fund in court has been apportioned among creditors who have duly proved, on payment of costs of the application and re-apportionment; (*Angell v. Haddon*, 1 Madd. 529;) and see *Gillespie v. Alexander*, 8 Russ. 180.

The advertisement should be inserted in a newspaper of the place or near to which the deceased died.

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MASTER'S OFFICE.—TAKING ACCOUNTS.—HIS POWERS. 193
[ORDER XLII., SEC. XII. AND XIII.]

The Master should not notice, in his report, the claims of creditors who do not prove. (*Good v. Blewitt*, 19 Ves. 386.)

SEC. 12.—In master's reports no part of any account, charge, affidavit, deposition, examination or answer, brought in or used in the master's office, is to be stated or recited, but instead thereof the same may be referred to by date or otherwise, so as to inform the court as to the paper or document so brought in or used. (o)

Accounts, &c.,
not to be stated in
reports.

(o) Order XLVIII. of the English Orders of 1841.

This section does not prevent the Master from finding facts from the evidence before him, and stating those facts, or from stating the reasons on which he proceeds in making his report, or from submitting any question to the court upon which the powers with which he is armed do not enable him to come to a satisfactory conclusion, or generally from giving the court an account of the effect produced on his own mind by the proceedings before him, it only rejects the practice of stating and reciting in the report the documents mentioned in it; (*Meux v. Bell*, 1 Hare, 93;) and see also in *re Grant*, 10 Sim. 574, where it is held that if the Master does state the grounds on which he proceeded he must also state the evidence from whence he deduces these grounds.

Nor does this section prohibit the Master from stating or reciting wills, deeds, and many other documents which do not remain in his office to be referred to after the report is made. (*Meux v. Bell*, *supra*.)

SEC. 13.—In the taking of accounts in the master's office, it shall be within the cognizance of the master to take the same with rests or otherwise; to take account of rents and profits received, or which, but for wilful neglect or default, might have been received; to set occupation rent; to take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so. And generally, in the taking of accounts, to enquire and adjudge as to all matters relating thereto, as fully as if the same had been specifically referred; subject, nevertheless, to the revision of the court upon appeal from the master's report; and it shall not be necessary to the taking of such accounts that any of the matters aforesaid should have been stated in the pleadings; or that evidence thereof

What within cognizance of master in taking accounts.

should have been given before the decree or order of reference; or that such decree or order should contain any specific direction in respect thereof. (*p*)

(*p*) *As to taking accounts generally.*—A party bringing in an account must do so in the form of debtor and creditor, verified by affidavit, unless the Master give other directions as to the form, &c., in which it is to be brought in. (See sec. 6 of this Order, *supra*.) The items on the debit side of course need not be proved; the admission being sufficient, the party must, however, swear that he has received nothing more than he has admitted, and if the opposite party wishes to charge the accounting party with more than he has debited himself with, he must give notice thereof pursuant to section 7 of this Order. The items on the credit side must be verified by the affidavit before mentioned, and also by proper vouchers, such as receipts, &c., which should be marked by the Master with his initials as a proof of his inspection and allowance of the same. (Bennett, M. O. 85.) The Master is bound to admit vouchers as evidence, unless the other side can shew reasonable ground for impeaching their genuineness. (*Ibid*; and see *Earl of Lonsdale v. Wordsworth*, there cited.)

All sums, however, not exceeding forty shillings each, need not be vouched, the oath of the accounting party is sufficient proof of them; (*Everard v. Warren*, 2 Cha. Ca. 249; *Bingham v. Lady Clanmorris*, 1 Moll. 20; *Anon*, 1 Vern. 283; *Whicherly v. Whicherly*, 1 Vern. 470; *Marshfield v. Weston*, 2 Vern. 176;) and see the remarks of *Kent Ch.*, in *Remsen v. Remsen*, 2 John Ch. 501. In such case, however, the affidavit of the accounting party should show when, where, and to whom the sums were paid, and should swear positively to the fact of payment, and not merely on belief. (*Robinson v. Cumming*, 2 A* 409, 410; *Anon*, 1 Vern. 283.)

The aggregate of such sums, not exceeding forty shillings, should not be more than £100. (*Whicherly v. Whicherly*, 1 Vern. 470.)

Where the evidence of the amounts with which the accounting party debits himself consists of entries in his books, he has a right to make use of the entries in the same book to vouch the items with which he credits himself; (*Darston v. Earl of Oxford*, 1 Eq. Ca. Abr. 10, Pl. 9;) and the accounting party may make use of the evidence produced by the opposite party, in the same way; (*Boardman v. Jackson*, 2 B. & B. 382, 6; but see *Morehouse v. Newton*, 3 DeG. & Sm. 307;) and see this case as to how far a defendant debiting himself by his answer can also discharge himself by such answer; and see further, *Robinson v. Scotney*, 19 Ves. 582; *Ridgeway v. Darwin*, 7 Ves. 404; *Thompson v. Lambe*, 7 Ves. 588; *Talbot v. Rutledge*, 4 Bro. C. C. 74, 76; *Kirkpatrick v. Love*, Amb. 589. See, however, further, as to the evidence to be adduced in support of accounts taken in the Master's office, sec. 2, of this Order, and notes thereupon; and also as to where vouchers have been lost, *Holstcomb v. Rivers*, 1 Ch. Ca. 127; *Peyton v. Green*, 1 Ch. Rep. 146; 1 Eq. Ca. Ab. 11.

It must be borne in mind, however, that the regular way of proof of items above forty shillings is by vouchers, and it would seem that the Master, except so far as he is empowered by sec. 2 of this Order, cannot dispense with such proof except by an order of the court. (*Dines v. Scott*, 1 T. & R. 358; *Maddeford v. Austwick*, 11 Sim. 209.)

After the accounts have been duly vouched the accounting party may be examined *viva voce*. (*Wormsley v. Sturt*, 22 Bea. 398.)

Under the head of "all just allowances," the Master is to allow all disbursements fairly and properly paid.

A solicitor, acting as steward and agent, is not entitled to his bills of costs under the head of just allowances. (*Jolliffe v. Hector*, 12 Sim. 398.)

Mortgage accounts either in foreclosure or redemption suits.—The amount stated in the mortgage is *prima facie* the true debt, and the Master cannot go behind it in the absence of evidence to impeach the statement in the deed. (*Pollock v. Perry*, 5 Grant, 691; *Piddock v. Brown*, 8 P. W. 289.) And where the usual affidavit as to the mortgage debt is made the onus to reduce the amount lies upon the opposite party. (*Warren v. Taylor*, *Ross v. Taylor*, 9 Grant's Ch. R. 69; 8 U. C. L. J. 243.) And see as to the affidavit of the assignee of the mortgagee where the mortgage has been assigned, Con. Stat. U. C. cap. LXXXVII., sec. 4.

The mortgagor may appear in the Master's office though the bill be taken *pro confesso* against him, and shew what was the true amount advanced. (*Penn v. Lockwood*, 1 Grant, 547.)

A party foreclosing, subject to a prior mortgage, cannot call the common mortgagor (if he have the equity of redemption) to give evidence as to the amount due on the prior mortgage. (*Warren v. Taylor*, *Ross v. Taylor*, 9 Grant's Ch. R. 69; 8 U. C. L. J. 243.)

Where a mortgage reserves a certain rate of interest and a lower rate has been paid and received by mistake, the mortgagee is entitled to the difference in taking the account. (*Gregory v. Pilkington*, 5 W. R. 57; 26 L. J. Ch. 177.)

A mortgagee is only entitled to six years' arrears of interest as against the land prior to the filing of his bill. (Con. St. U. C. cap. LXXXVIII., sec. 19.) But under Con. St. U. C. cap. LXXVIII., sec. 7, he can recover 20 years' arrears in a personal action on his covenant against the mortgagor, or his personal representatives. (*Hunter v. Nockolds*, 1 M. & G. 640; *Shaw v. Johnson*, 1 D. & S. 412; 30 L. J. Ch. 646; 7 Jur. N. S. 1005; 4 L. T. N. S. 461; 9 W. R. 629; *Lewis v. Duncombe*, 3 L. T. N. S. 867; 7 Jur. N. S. 695.) The covenant cannot be tacked to the mortgage in a foreclosure suit against the mortgagor. (*Ibid.*) It may be so tacked, however, against the heir of the mortgagor to avoid circuity of action, the covenant being a charge upon the lands in his hands as assets by descent, consequently in a foreclosure suit against such heir it would seem that the mortgagee, if he make a case for tacking on his bill, will be entitled to 20 years' arrears; (*Sinclair v. Jackson*, 17 Beav. 405; which also decides that a foreclosure suit, is a suit to enforce the payment of money within the statute; see, however, *Round v. Bell*, 5 L. T. N. S. 15; 31 L. J. Ch. 127; 7 Jur. N. S. 1183; 9 W. R. 846;) and in a redemption suit by such heir he will be entitled to 20 years' arrears, though no case for tacking be made on the pleadings. (*Elry v. Norwood*, 5 DeG. & S. 240.)

Where a mortgagee takes possession of the mortgage premises and evicts a tenant of the mortgagor who is willing to continue in possession and pay rent, the mortgagee will be liable for rents from that time. (*Penn v. Lockwood*, 1 Grant, 547; and see *Smart v. Hunt*, 1 Vern. 418, n; *Trulock v. Robey*, 15 Sim. 265, 267; 2 Ph. 396.) And if he continue in possession after the whole mortgage debt is paid off the account of such rents and profits or of occupation rent will be taken with interest and annual rests from the time of such payment of the mortgage debt. (*Wilson v. Cluer*, 3 Beav. 140; *Wilson v. Metcalfe*, 1 Russ. 580; *Morris v. Islip*, 20 Beav. 654; *Quarrell v. Beckford*, 1 Mad. 269.)

A mortgagee in possession is also liable to account "with wilful neglect and default." (*Anon*, 1 Vern. 45; *Bulstrode v. Bradley*, 3 Atk. 582; *Quarrell v. Beck*.)

ford, 1 Mad. 274; Kensington v. Bouverie, 1 Jur. N. S. 580;) but he will not be liable for not letting at a higher rent if the mortgagor have not notified him that higher rents can be obtained. (Hughes v. Williams, 12 Ves. 498.) And if the mortgagee be in personal occupation, the rent charged will be the full annual value. (Morony v. O'Dea, 1 B. & B. 118; Trimleston v. Hamill, 1 B. & B. 385.) A mortgagee in possession is also liable for any destruction of, or damage to the property. (Hornby v. Matcham, 16 Sim. 325; Sandon v. Hooper, 6 Beav. 246; 14 L. J. Ch. 120.)

A mortgagee, however, will be allowed sums spent by him in necessary repairs and lasting improvements; (Neesom v. Clarkson, 4 Hare, 97; Webb v. Rorke, 2 Sch. & L. 878; Quarrell v. Beckford, 14 Ves. 177; 1 Mad. 278;) and see Constable v. Guest, 6 Grant, 510; where it is held that if a mortgagee is charged with rents and profits derived from improvements made by him, it would be unreasonable not to allow him the expense of such improvements to a corresponding amount.

The improvements, though sanctioned by the mortgagor, must not be such, however, as will cripple his ability to redeem. (Sandon v. Hooper, 6 Beav. 246.)

Where there is no contract between the mortgagor and mortgagee (as by a clause in the mortgage deed) as to insurance, the mortgagee is not entitled to charge premiums of insurance paid by him; (Russell v. Robertson, Grant Cham. R. 72; 6 U. C. L. J. 143; Dobson v. Land, 8 Hare, 216;) and in such case, if there be any loss from fire, the mortgagor will not be entitled to credit for the amount received by the mortgagee on the policy. The mortgagee pays for the risk, and ought to have the benefit. (*Ibid.*)

Where the decree directs the account to be taken with "all just allowances," the Master may on a first or subsequent foreclosure allow a sum paid for insurance since the last foreclosure, with interest, though the decree simply directs him on each successive foreclosure to compute subsequent interest and tax subsequent costs. (Bethune v. Calcutt, 8 Grant, 648.) This was a case prior to the Orders of 1853, and it would seem that under this section (13) the Master could make such allowance, though the decree contains no stipulation as to "all just allowances."

Where an assignment of the mortgage is made the assignee is entitled to the full amount actually due upon it, no matter how much he paid for it; (Phillips v. Vaughan, and Williams v. Springfield, 1 Vern. 336 and 476; Batchelor v. Middleton, 6 Hare 75;) unless the assignee be in a fiduciary relation to the mortgagor. He is not, however, (if the assignment be without the concurrence of the mortgagor,) entitled to more than the amount actually due, as he stands in the mortgagee's place and is bound by the state of account between him and the mortgagor. (Matthews v. Wallwyn, 4 Ves. 118; Chambers v. Goldwin, 9 Ves. 254; Jones v. Gibbons, 9 Ves. 411; Moffatt v. Bank of Upper Canada, 5 Grant, 377.) The assignee is indeed bound by all the equities between the mortgagor and mortgagee; (Parker v. Clarke, 7 Jur. N. S. 1267; 9 W. R. 877; McPherson v. Dougan, 9 Grant, 258;) so that if it comes to his hands satisfied in any way he can claim nothing under it, and would be a bare trustee of the legal estate. (Woodruff v. Street, per Vankoughnet, C., October, 1862, not reported.)

If the mortgagor be a party to the assignment, however, the assignee would be entitled to the amount appearing due on the face of the mortgage.

The assignee is also bound by payments made by the mortgagor to the mortgagee, after the assignment, but without notice of it. (Williams v. Sorrell, 4 Ves. 389; Norrish v. Marshall, 5 Mad. 476; Galbraith v. Morrison, 8 Grant, 289; Engerson v. Smith, 9 Grant, 16.)

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Accounts of amount due for purchase money in suits for specific performance.—In taking accounts of this kind the court is as a rule bound strictly by the terms of the agreement, for as a general rule the court cannot vary the agreement made between the parties, and consequently executes the whole contract in the terms agreed upon, or not at all. (*Nurse v. Lord Seymour*, 18 Beav. 269; *Gervais v. Edwards*, 2 Dr. & War. 80.)

A contract, therefore, for the payment of the purchase money, or in default of payment at the time specified, then with interest from that time at a rate above the former legal rate, was not looked upon as usurious, the interest being looked upon as purchase money. So, where the agreement is to pay compound interest; (*Beete v. Bidgood*, 7 Barn. & Cr. 453; *Floyer v. Edwards*, 1 Cowp. 112; *Henderson v. Dickson*, per *Spragge*, V. C., in Chan. U. C., 1862;) the contract in these respects differing from a mortgage transaction.

Where there is no agreement as to interest and the purchaser enters into possession, he will be chargeable with rents and profits, or with interest at the legal rate from the date of entry. (*Cowpe v. Bakewell*, 18 Beav. 421; *Toft v. Stephenson*, 7 Hare, 1; 1 DeG. M. & G. 28; 5 DeG. M. & G. 735; *Tewart v. Lawson*, 3 Sm. & G. 307;) and it would seem that unlike the case of mortgages the Statute of Limitations cited *supra*, does not apply as to arrears of interest being limited to six years. (*Birch v. Joy*, 3 H. L. 565; where 40 years' interest was allowed; *Wallis v. Bastard*, 4 DeG. M. & G. 261; 17 Jur. 1107; *Ravenscroft v. Frisby*, 1 Coll. 16; *Greenwood v. Churchill*, 8 Beav. 418.)

Where payments have been made on account of the purchase money to an amount exceeding the interest, rests should be made. (*Griffith v. Heaton*, 1 S. & S. 271.)

The purchaser is only liable for interest from the time of shewing a good title where he has not been in possession, (even though the agreement be to pay interest from a certain time, from whatever cause delay may arise,) if the delay be from the fault of the vendor; (*DeVisme v. DeVisme*, 1 M. & G. 336;) and so in a sale under a decree of the court; (*Robertson v. Skelton*, 12 Beav. 365;) but if the delay in shewing title is not from the fault of the vendor, the purchaser must pay interest from the day agreed upon. (*Sherwin v. Shakspear*, 5 DeG. M. & G. 517-27-35-36; *Vickers v. Hand*, 26 Beav. 630.)

As to taking account where the purchaser has been in possession and the sale is afterwards set aside, see *Donovan v. Fricker*, Jac. 165.

Accounts of amount due on judgments.—The exemplification of the judgment is the proper proof. In taking an account on a judgment the Master may allow a reasonable sum for executions and sheriff's fees.

The party against whom the account is taken has no right, as a general rule, to claim any set-off which he might have claimed at law; (*Cameron v. McDonald*, 7 Grant, 402;) in which case, however, such set-off was allowed under peculiar circumstances.

Where under the law previous to the abolition of registry of judgments, a creditor proved his judgment as a subsequent incumbrancer in a foreclosure suit, he was only entitled as against the land to charge six years' arrears of interest prior to bringing his claim into the Master's office; (*Greenway v. Bromfield*, 9 Hare, 201; *Henry v. Smith*, 2 Dr. & War. 381;) it would seem that the same rule will apply to subsequent incumbrancers generally made parties for the first time in the Master's office, if such incumbrancers are within the statute.

Partnership accounts.—As to the method of taking partnership accounts in a diffi-

cult and intricate case, see *Davidson v. Thirkell*, 8 Grant, 380; it is contrary to the general rule to charge partners with wilful neglect and default in taking their accounts. (*Ibid*; and see *Rowe v. Wood*, 2 J. & W. 556.)

In taking partnership accounts, the Master cannot find a balance due from one partner to another, unless all the assets are realized and the liabilities paid. (*Smith v. Crooks*, 3 Grant, 321.) And see *Crawshaw v. Collins*, 15 Ves. 221; *Campbell v. Mullett*, 2 Sw. 551; *Taylor v. Fields*, 4 Ves. 396.

On a bill filed by a surviving partner against the executor of a deceased partner, the executor was held bound to comply with the direction of the Master to make up the partnership accounts from the books of the partnership in his possession. (*Strathy v. Crooks*, 6 Grant, 162.)

Under sec. 2, of this Order, the Master can receive the partnership books as evidence for and against partners. (*Lodge v. Prichard*, 3 DeG. M. & G. 906; s. c. before the court below, 1 Sm. & G. App. viii.)

Capital advanced to the firm by one of the partners does not carry interest; (*Rhodes v. Rhodes*, Jo. 653;) unless there be a contract express or implied that it shall carry interest.

In taking accounts after the death of a partner, they must begin with the last stated account, or if there is no stated account, then from the beginning of the partnership, and such accounts must end with the state of the stock at the date of the death. (*Pemberton v. Oakes*, 4 Russ. 154.)

Accounts between principal and agent.—An agent fraudulently misappropriating money will be charged with interest; (*Berwick v. Murray*, 7 DeG. M. & G. 518; 5 W. R. 208;) so where an agent had received large sums from his principal and used them in his own business he was charged with interest with annual rests. (*Landman v. Crooks*, 4 Grant, 353.)

Where an agent employs sub-agents and the principal sustains loss thereby, the account will be taken against the agent "with wilful default." (*Abingdon v. Way*, cited Seton on Decrees, 3rd ed., p. 104.)

It is the agent's duty to preserve vouchers; (*Stainton v. Carron Co.*, 24 Beav. 346, 352; 8 Jur. N. S. 1235;) and see this case as to agent's accounts generally.

Settled accounts between parties will not be disturbed. (*Newen v. Wellen*, 81 L. J. Ch. 792; 10 W. R. 745.)

Accounts of trustees, executors and administrators.—As a general rule persons of this character (and generally in a fiduciary relation) are not allowed to reap any benefit from the manner in which they perform their duty. (*Wedderburn v. Wedderburn*, 2 Keen, 722; 4 M. & Cr. 41; 22 Beav. 84, 100, 124; *Jones v. Foxall*, 15 Beav. 392; *Morret v. Paské*, 2 Atk. 54.)

Nor will they be allowed any thing for personal care and trouble in the performance of their duty; (*Robinson v. Pett*, 3 P. W. 249; 2 Eq. Ca. Abr. 454, Pl. 10; *Moore v. Frowd*, 3 M. & C. 50; *Kirkman v. Booth*, 11 Beav. 273;) but see Con. Stat. U. C. cap. XVI., secs. 54, 66, which provide for allowances to executors and administrators for their care and trouble; and see *McLennan v. Heward*, 9 Grant, 279, which decides that the Court of Chancery will settle such allowance without a reference to a surrogate judge.

They are entitled, however, under the head of "just allowances," to all reasonable expenses incurred by them; (*Brocksopp v. Barnes*, 5 Mad. 90;) as by necessarily

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employing agents; (*Bonithon v. Hockmore*, 1 Vern. 316; *Wilkinson v. Wilkinson*, 2 S. & S. 237; but see *Weiss v. Dill*, 3 M. & K. 26;) or in paying the costs of a solicitor properly employed by them; (*Johnson v. Telford*, 3 Russ. 477; where the solicitor's bill was moderated but not strictly taxed by the proper officer;) or in reasonably and properly taking opinions of counsel; (*Fearn v. Young*, 10 Ves. 184;) but not if such expenses were improper; (*Malcolm v. O'Callaghan*, 3 M. & C. 52;) but they will not be allowed interest on the expenses so incurred by them; (*Gordon v. Trail*, 8 Price, 416;) see however *Menzies v. Ridley*, 2 Grant, 544, where it is held that an executor is entitled to interest on money advanced by him out of his own means, and properly expended in the management of the estate.

If a trustee, &c., employ trust money in speculations of his own the *cestui que trust* may either charge him with legal interest or with the profits actually made; (*Docker v. Somes*, 2 M. & K. 655;) see also *Erskine v. Campbell*, 1 Grant, 570, where an executor, having applied the funds of the estate to his own use, and made untrue statements in his answer, was charged with interest *with annual rests*. And see further as to under what circumstances an administrator is, or is not chargeable with interest and rests; *McLennan v. Heward*, 9 U. C. L. J. 18.

As to the liability of trustees generally for their conduct in the management of the estate, in getting in outstanding property, as to the custody and investment of property, for the acts of their co-trustees, &c., and as to joining in receipts with their co-trustees, &c., or in acquiescing in breaches of trust, &c., see 2 White and Tudor's leading cases in Eq., pp. 718-766.

Sec. 14.—Under any order of reference to the master, ^{What proceedings may be taken in master's office without special order.} witnesses may be examined before any examiner of the court; and upon the certificate of the master foreign commissions may issue for the examination of witnesses without the jurisdiction of the court; the master is to be at liberty to cause parties to be examined, and to produce books, papers and writings as he shall think fit, and to determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he shall not deem it necessary that such books and papers or writings should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time, and in such manner as he shall deem expedient. (q) The master is also to be at liberty to cause advertisements for creditors, and if he shall think it necessary, but not otherwise, for heirs or next of kin, or other unascertained persons, and the representatives of such as may be dead, to be published, as the circumstances of the case may require; and in such advertise-

200 MASTER'S OFFICE.—PROCEEDINGS WITHOUT SPECIAL ORDER.

[ORDER XLII., SEC. XV.]

ments to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded from the benefit of the decree: and in taking any account of a deceased's personal estate, under any order of reference, the master is to enquire and state to the court what, if any, of the deceased's personal estate is outstanding or undisposed of; and is also to compute interest on the deceased's debts from the date of the decree, and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will, and in that case according to the will; and under any order whereby any property is ordered to be sold with the approbation of the master, the same is to be sold to the best purchaser that can be got for the same—to be allowed by the master, and either in one lot or in parcels, as the master shall direct; and all proper parties are to join therein as the master shall direct; and under every order whereby the delivery of deeds is ordered or the execution of conveyances is directed, the master is to give directions as to the delivery of such deeds, and to settle conveyances where the parties differ, and to give directions as to the parties thereto, and the execution thereof; and for the several purposes herein enumerated no special order of the court shall be necessary.

(g) A master is bound equally with the court to allow the cross-examination of each witness on the whole case without regard to the limits of the examination in chief. In such cases under extraordinary circumstances, however, the Master has a discretion as to charging his own fees. (*Crandell v. Moon*, 6 U. C. L. J. 143.)

It is not necessary to obtain an order for the transmission to the office of a Master in an outer county by the Master in Toronto of papers brought into his office, as the Master will do so on præcipe. (*Alchin v. Buffalo*, *Grant's Cham.* 24.)

Sec. 15.—Where in proceedings before the master it appears to him that some persons not already parties ought to be made parties, and ought to attend, or be

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MASTER'S OFFICE.—ADDING PARTIES.
[ORDER XLII., SEC. XVI.]

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enabled to attend the proceedings before him, he may direct an office copy of the same to be served upon such parties; and upon due service thereof such parties are to be treated and named as parties to the suit, and to be bound by the decree in the same manner as if they had been originally made parties to the suit. Parties may be added in master's office.

Every office copy of a decree directed to be served under this section, is to be endorsed with a notice to the effect set forth in schedule N. to these orders, with such variations as circumstances may require. (r)

(r) Schedule N. is as follows:

SCHEDULE N.

NOTICE TO BE ENDORSED ON AN OFFICE COPY OF A DECREE UNDER ORDER XXXIV., SEC. 6, AND ORDER XLII., SEC. 15.

To Mr. _____, the person upon whom service has been directed.

(Set out the order.)

If you wish to apply to discharge the foregoing order, or to add to or vary the decree, you must do so within fourteen days from the service hereof. (When the order fixes a time for the further proceedings, add.) And if you fail to attend at the time and place appointed, either in person or by your solicitor, such order will be made and proceedings taken in your absence, as the judge may think just and expedient; and you will be bound by the decree and the further proceedings in the cause in the same manner as if you had been originally made a party to the suit, *without any further notice.*

See *supra*, pages 11, 15, Order VI. of the Orders of June, 1853, sec. 2, rule 6, and *Patterson v. Holland*, 7 Grant, 1; 6 U. C. L. J. 256; there cited. And see also Orders of 29th June, 1861, *supra*, p. 137, as to persons interested in the equity of redemption being made parties in the Master's office.

Query, has the Master power to make parties unless so directed by the decree?

See also the Orders of the 10th day of January, 1863, as to service of parties out of the jurisdiction. Order VII. of these orders provides for service out of jurisdiction under stat. 20 Vic., cap. 56, sec. 15, and it has been held that where persons made parties in the Master's office are served with an office copy of the decree under this section (15) the time limited in the section within which they are to appear in the Master's office must be the time within which they are to appear as provided for by the Orders of January, 1863. In effect the office copy decree and notice so served brings the party served before the court for the first time, and is held to be analogous to the service of an office copy of a bill of complaint.

SEC. 16.—So soon as the hearing of any matter pend-

Report, preparing,
settling, and sign-
ing.

ing before the master shall have been completed, he shall so inform the parties to the reference then in attendance, and shall make a note to that effect in the master's book; and after such entry no further evidence shall be received, (s) or proceedings had, without the special permission of the master; but the master shall proceed to prepare his report or certificate without further warrant, except the warrant to settle, which shall be served on the parties as the master shall direct. So soon as the master's report or certificate shall have been prepared, it shall be delivered out to the party prosecuting the reference, or in case he shall decline to take the same, then, in the discretion of the master, to any other party applying therefor; and a common attendance shall be allowed to the party taking the same.

(s) In a creditor's suit a witness was examined by the plaintiff with the view of disallowing the claim of an alleged creditor after the evidence had been closed, the plaintiff moved the court (on affidavit stating that he had since learned that the witness could have deposed that the alleged creditor had admitted a settlement of his claim) for leave to re-examine the witness, but the motion was refused with costs. (*Patterson v. Scott*, 1 Grant, 582.)

Where the party on whom the *onus probandi* lies produces evidence (such as a receipt or release) of so conclusive a nature that he is justified in relying on it in the first instance and closes his evidence, and the other side produces testimony tending to shake such evidence, further evidence in support will be allowed, though in strictness it might have been produced in the first instance, and the other side will be entitled to adduce testimony rebutting or explaining the fresh evidence. (*Moody v. McCann*, Grant's Cham. 88.)

Settlement and signature of report.—Evidence must not be received by the Master after he has settled his report. (*Thompson v. Lambe*, 7 Ves. 587.)

The Master's report had been confirmed; the cause came on for further directions, when the court, from the facts stated in the report, entertaining great doubt as to the correctness of the Master's finding, declined to act upon it, though it refused then to alter it. (*Gregory v. West*, 2 Ben. 542.) The court must give credit to what the Master reports as occurring in his presence. (*Walmsley v. Walmsley*, 3 J. & L. 556.) Pending an enquiry before the Master, the court will not interfere with his conduct. The dissatisfied party must wait until the report is made, and then appeal from it, before it is confirmed. (*Maddeford v. Austwick*, 11 Sim. 209; 10 L. J. Ch. 105; 4 Jur. 1107.)

The Master's report speaks from its date. (*Jennings v. Elster*, 1 M. & K. 440; 2 L. J. N. S. Ch. 72.)

MASTER'S REPORT; APPEAL FROM.
[ORDER XLII., SEC. XVII.]

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SEC. 17.—Reports become absolute, without order confirming the same, in fourteen days after the signing thereof, unless previously appealed from. An appeal shall lie to the court upon motion, within fourteen days from the signing of the report, in respect of the finding of the master upon any matter presented in his office for his decision, without objections or exceptions being previously taken. The appeal motion may be made by any party affected by the report; and upon notice thereof being served, all the proceedings before the master in the matter, and all papers and evidence relating thereto, are, at the instance of any party interested therein, to be transmitted by the master to the registrar, to be produced by him in court, upon the hearing of such motion. (t)

Reports when absolute—appeal from.

(t) This section is altered and varied by the Orders of the 29th June, 1861, which so far as pertain to this section are as follow :

“APPEALS FROM MASTER'S REPORT.

Section 17 of General Order XLII., is altered and varied in the following particulars :

Reports become absolute, without order, confirming the same at the expiration of fourteen days after the filing thereof, unless previously appealed from. An appeal shall lie to the court upon motion, at any time from the signing of the report, to the expiration of fourteen days from the filing of the same in respect of the finding of the Master upon any matter presented in his office for his decision, without objections or exceptions being previously taken.

It shall be competent for any party affected by the report to file the same, or a duplicate thereof, and the filing of such duplicate shall have the same effect for the purposes of this order as the filing of the report, by the party taking the same.”

The long vacation is reckoned in computing the time for confirmation of the Master's report.

It is sufficient that notice of appeal be served within the fourteen days, the appeal need not come on within that time. (Grimshawe v. Parks, 6 U. C. L. J. 142.) A party cannot appeal after fourteen days without leave. Where, however, notice of the appeal was given one day too late, and the other side instead of moving to set the proceeding aside, served notice of cross-appeal, it was held that he waived the irregularity. (Larkin v. Armstrong, Grant's Cham. 81.)

Where the fourteen days had, through oversight, been allowed to expire, leave to appeal was given on paying costs of the application. (Covens v. McDougall, Grant's Cham. 29.) And see also as to obtaining leave to appeal after confirmation of the

Master's report. *Allen v. Allen*, 1 Dick. 362; 1 Swan. 157, n; *Hawkins v. Day*, 1 Ves. Sr. 189; 1 Sw. 158; *Ves. Sr. Supp.* 109; *Mortara v. Hall*, 4 L. J. N. S. 53; *E. of Bath v. E. of Bradford*, 2 Ves. Sr. 587; *Turner v. Turner*, 1 J. & W. 39; 1 Sw. 154.

Where the report is from its nature final, and does not require confirmation, proceedings may be taken upon it, though the fourteen days have not elapsed. (*Empringham v. Short*, 11 Sim. 78; *In re Yaggie*, 7 U. C. L. J. 293.)

General reports.—As a rule the Master has no authority to report upon any thing not directed by the decree. (*Lee v. Willock*, 6 Ves. 605.) It has, however, been asserted, that the Master, where from the difficulty of the matter he thinks proper, has a general power to report specially; (*Anon*, 2 Atk. 621; *Champernowne v. Scott*, 4 Mad. 209; but see *Ganderton v. Ganderton*, 13 Sim. 182;) there is no doubt, however, he has such power in taking an account. (*Anon*, 2 Atk. 621.)

If a Master reports as to matters not referred to him, the court will pay no attention to such matters; (*Jenkins v. Briant*, 6 Sim. 605;) if, however, an objection is desired to be taken to a report on the above ground, it should be by moving before confirmation, that it may be referred back to the Master to review his report; (*ibid*;) it would seem to be improper to take such objection by way of appeal from the report. (*Ibid*; and see *Rufford v. Bishop*, 6 Russ. 347.) And, on the other hand, if the Master do not report on sufficient facts for the court to make any decree on further directions, a reference back to the Master to review his report will be directed. (*Turner v. Turner*, 1 Dick. 313; 1 Sw. 156, n.)

Where the discretion of the court has been exercised and the Master is only called upon to perform some act, (such as to settle conveyances or appoint trustees,) or make some enquiry necessary for carrying out the order which the court has made, the report does not require confirmation. (*Daniell's Ch. Pr.*, 2nd ed., 1485, 1st Am. ed.; and see *Otley v. Pensam*, 1 Hare, 324.)

The time for confirmation of the report may be enlarged on special application therefor. (*Hand*, 169.)

Separate reports.—The Master has power to make a separate report without a special direction in the decree. See the 70th of the English orders of 1828, and *query* are the English orders prior to 1837, applicable here, where they do not conflict with our own? Separate reports are subject to the same rules as general reports, as to appealing therefrom, &c. (*Drever v. Maudesley*, 7 Sim. 240.) It would seem, however, that a cause cannot be set down for hearing on further directions on a separate report; if such report is required to be acted upon it must be by petition praying such directions as arise out of such separate report. (*Daniell's 2nd ed.*, p. 1476; 1st Am. ed.) The separate report should be alluded to in the general report so that the court may see that all matters referred have been disposed of. (*Bennett's Master's office*, 18.)

As to correcting error in Master's report.—The Master, in making a subsequent report, is not at liberty to correct an error in his previous report, and if the objection (that he has made such correction) be apparent on the face of the report the objecting party is not driven to appeal. (*Crooks v. Street*, *Grant's Cham.* 78.)

A clerical error in a report whereby the time for payment of mortgage money was materially shortened, was allowed to be amended on an *ex parte* application of the plaintiff; (*White v. Courtney*, *Grant's Cham.* 11;) and see further as to amending errors in reports; *Yow v. Townsend*, 1 Dick. 59; *Weston v. Haggerston*, *G. Coop.* 134; *Hatchell v. Cremorne*, *Sau. & S.* 675.

Where a bill had been taken *pro confesso* against the defendant on a sale decree,

and no subsequent incumbrances proved, after the final order had been made and the advertisement of sale published it was discovered that the Master had omitted to include in his report two items of interest amounting to a large sum, as set forth in the plaintiff's affidavit of claim, the error appearing on the face of the papers filed. On an affidavit stating these facts, and on production of the papers from the Master's office, *Eaten, V. C.*, held that there was no necessity for appointing a new day for payment, and made an order referring it back to the Master to take a fresh account of the plaintiff's claim, to amend his report, and leave was given to fix a new upset price and to postpone the sale if necessary. (*Bessey v. Graham, 9 U. C. L. J. 82.*)

Appeals from Master's report.—Appeals do not lie against a mere certificate of a master as of non-production of documents in his office, or of proceedings in his office, granted under sec. 9 of this order, or of taxation; (*Jones v. Powell, 1 Sim. 387; Kemp v. Wade, 2 Keen, 687; Pitt v. Mackreth, 8 Bro. C. C. 321; In re Congreve, 4 Beav. 88; Lucas v. Temple, 9 Ves. 299; Purcell v. McNamara, 12 Ves. 170; Fenton v. Crickett, 8 Mad. 496.*) the proper course is to move to quash the certificate if it be wrong, or in case of taxation a petition stating the items alleged to be erroneous should be presented for leave to review the taxation, and if leave be granted the judge will decide upon the items. (*Ibid*)

Where the error is apparent on the face of the report, as a wrong legal deduction from facts stated correctly, an appeal is not necessary, the point may be argued on further directions. (*Adams v. Claxton, 6 Ves. 226; and see Bick v. Motly, 2 M. & K. 812.*)

Any party to the suit interested in the report may appeal against it; also creditors who have proved their claims even though not parties; (*Wilson v. Wilson, 2 Moll. 328.*) and persons claiming to be creditors but whose claims the Master has disallowed may (upon obtaining leave) appeal against so much of the report as relates to their claims. (*Lockhart v. Hardy, 5 Bea. 305; Gregg v. Taylor, 4 Russ. 279; Paynter v. Houston, 3 Mer. 297.*) If the Master in a creditor's suit disallow the claim of the plaintiff, who appeals, the court will not take the carriage of the decree from the plaintiff pending the appeal. (*Jeudwine v. Agate, 5 Russ. 283.*)

Reports which do not require confirmation may be appealed against as well as other reports. (*Empringham v. Short, 11 Sim. 80; but see Otley v. Pensam, 1 Hare, 322; Russel v. Buchanan, 9 Sim. 167.*)

The Master's report is *prima facie* evidence of what it contains, unless appealed from. No motion founded on such report can be entertained while the appeal is unheard. (*Nichols v. McDonald, 6 Grant's Ch. R. 594; 4 U. C. L. J. 260; on appeal in 8 Grant's Ch. R. 106.*) *Query*, whether a motion founded on such matters contained in the report as are not the subject of, and are unaffected by, the appeal would not be entertained. (*Ibid.*)

Upon an appeal from the Master's report although it would have been more satisfactory to the court and also in accordance with the practice, to have referred the case back to the Master, or directed a re-argument of the case, the court considering the great delay and expense to which the parties had been already subjected, undertook the settlement of the account, and made an order varying the finding of the Master to suit the true state of the account between the parties, so far as the evidence would enable them to do so. (*Saunders v. Christie, 7 Grant's Ch. R. 149.*)

A party though having the same interest as the appellant has nevertheless a right to be present on the argument of the appeal. (*Larkin v. Armstrong, Grant's Cham. 81.*)

Where an incumbrancer who objected to the priority as found by the Master ap-

pealed from the finding, the court considered this more convenient than moving to discharge the Master's order making him a party, though such course was also open to him. (*McDonald v. Rodger*, 8 U. C. L. J. 246.)

Under this section the appellant occupies the same position as under the old practice he would have done on bringing in objections, and is therefore at liberty to shew the report wrong on any ground specified in his notice of motion; the notice of motion by way of appeal having been substituted for the old practice of objections and exceptions. Parties may conduct themselves in the master's office so as to preclude objections to proceedings, no matter how erroneous, but apart from such specialities, the whole case is open to them on appeal. (*Davidson v. Thirkell*, 8 Grant, 380.)

The practice is, however, to state the objections to the report in the notice of motion, and the notice of motion must set out each objection to the report (with sufficient particularity) upon which the appellant relies, although he may conclude with a general objection to the whole report, and the report if referred back at all must be referred back on one, at least, of the grounds stated in the notice of motion.

It would seem that the appellant on the argument is not confined to the grounds of appeal set forth in his notice. (*Abell v. Heathcote*, 4 Bro. C. C. 278, 283.)

The counsel for all parties on the argument may be heard in support of the report, but only the counsel of the appellant can be heard in support of the appeal. (2 *Smith's Ch. Pr.*, 3rd ed. 376.)

On the appeal no evidence can be used which was not before the Master when he made his report; (*Redifer v. O'Brien*, 3 Mad. 44; *Davis v. Davis*, 2 Atk. 21; but see *Hedges v. Cardonnel*, 2 Atk. 408;) so the defendant's answer cannot be read on the appeal, if it was not read before the Master. (*Randa v. Pushman*, 6 Sim. 46.)

The court cannot make any order on the appeal inconsistent with the decree, as all proceedings subsequent to a decree should be consistent with it. (*Brown v. De Tastet*, Jac. 293; *East India Co. v. Keighley* 4 Mad. 16.)

If on the appeal the report is referred back to the Master, the reservation of further directions is continued until the Master shall have made his report. (*Daubeny v. Coghlan*, 12 Sim. 507.)

Reviewing report.—When it is referred back to a Master to review his report, he is at liberty to receive further evidence; (*Twyford v. Trail*, 3 M. & C. 645;) and that, too, without special order; (*Cottrell v. Watkins*, 1 Bea. 366; 3 Jur. 283;) and where, on a reference as to title, the Master has reported in favour of the title, but upon appeal from his report the court thinks he has done so erroneously or on insufficient grounds, the course is to give the respondent the option of a reference back to the Master to review his report. (*Curling v. Flight*, 2 Phil. 613; 17 L. J. Ch. 359; 12 Jur. 423; varying, s. c., 6 Hare, 49; 17 L. J. Ch. 79; 12 Jur. 91.) And see *Andrew v. Andrew*, 8 Sim. 390; *Egerton v. Jones*, 3 Sim. 392. Where a party has had an opportunity of raising a question in the Master's office, but does not, and afterwards applies to the court for liberty to do it, the report will for that purpose be sent back to the Master to review; but the party applying must pay the other party his costs as between solicitor and client.. (*Kelly v. Bonynges*, 2 Moll. 383.)

REGISTRAR'S OFFICE.—SOLICITOR'S AND AGENT'S BOOK.—
OFFICE COPIES.

XLIII.—The registrar is to keep in his office a book

to be called "The Solicitors and Agents' Book," in which each solicitor residing elsewhere than in the city of Toronto is to specify the name of an agent being a solicitor of this court, and having an office in the city of Toronto, upon whom pleadings, writs, notices, orders, appointments, warrants, and other documents and written communications may be served.

The Registrar to keep a solicitors' and agents' book.

Where the pleadings in any case have been filed in the office of the registrar, there all pleadings, writs, notices, orders, appointments, warrants, and other documents and written communications in relation to such suit, which do not require personal service upon the party to be affected thereby, are to be served upon the solicitor, when residing in the city of Toronto, or, where the solicitor resides elsewhere than in the city of Toronto, then upon his agent named in "the Solicitor and Agent's Book," as provided above; and, where the pleadings have been filed elsewhere than in the office of the registrar, then all notices, appointments, warrants, and other documents and written communications in relation to matters transacted in court, or chambers, or in the office of the master or registrar, are to be served in like manner; and if any solicitor neglect to cause such entry to be made in "The Solicitor and Agent's Book" the leaving a copy of any such pleading, writ, notice, order, appointment, warrant, or other document or written communication, for the solicitor so neglecting as aforesaid, in the office of the registrar, is to be deemed sufficient service, unless the court direct otherwise. (u)

(u) See Order promulgated on the 29th of June, 1861, as to

"NOTICES, APPOINTMENTS, &C., HOW TO BE SERVED.

The General Order of this Court, number 43, is altered and varied in the following particulars:

Where the pleadings in any cause have been filed in the office of the Registrar of

the Court, at Toronto, or in the office of any Deputy-Registrar, all notices, appointments, warrants, and other documents and written communications in relation to matters transacted in Court or Chambers, or in the office of the Master or Registrar, which do not require personal service upon the party to be affected thereby are to be served upon the solicitor, when residing in the city of Toronto; and when the solicitor to be served resides elsewhere than in the city of Toronto, then such notices, appointments, warrants, and other documents, and written communications aforesaid, may be served either upon such solicitor, or upon his Toronto agent, named in the "Solicitors' and Agents' Book;" unless the Court, or a Judge thereof, or a Master, before whom any such proceeding may be had shall give any direction as to the solicitor upon whom any such notice, appointment, warrant, or other document or written communication shall be served. And if any solicitor neglect to cause such entry to be made in "the Solicitors' and Agents' Book," as is required by the above general order, the leaving a copy of any such notice, appointment, warrant or other document, or written communication for the solicitor so neglecting as aforesaid, in the office of the Registrar, is to be deemed sufficient service, unless the Court direct otherwise."

As to the powers and duties of Registrars generally, see *Davenport v. Stafford*, 8 Bea. 508.

The Registrar in drawing up decrees may, by consent, introduce such alterations in the decree as he thinks the court would sanction, and such alterations will be binding on the parties. See observations of Lord Langdale in 8 Bea. 511.

The decree or order is said to be "passed" when the Registrar has inserted his initials in the last page as an authority to the entering clerk to enter it in the Registrar's book. (*Seton on Decrees*, 584.) In our court the Registrar's practice is to sign the decree or order as an authority for it to be entered. All proceedings on a decree or order, before it is entered, are voidable and irregular. (*Tolson v. Jervis*, 8 Bea. 364.) When passed and entered it can only be varied on a re-hearing. (*Seton on Decrees*, 588.)

An order drawn up in the absence of a defendant, will not, unless error either of form or substance be shewn, be set aside. (*Smith v. Acton*, 26 Bea. 559.) A notice to draw up an order served one day for the next is regular. (*Re Christmas*, 19 Bea. 519.)

A certificate of the Registrar will be conclusive as to the filing of a pleading. (*Beavan v. Burgess*, 10 Jur. 63.)

Unless satisfied that the office copy is insufficient, the court will not order production of the original document. (*Attorney-General v. Ray*, 6 Bea. 335; 2 Hare, 518; 3 Hare, 335; and *Jervis v. White*, 8 Ves. 318.) And if an order be applied for, the application should not be *ex parte*. (*Lamb v. Danby*, 9 W. R. 765; 5 L. T. N. S. 342.)

Name of solicitor
to be endorsed on
writs, &c.

SEC. 2.—Upon every writ sued out, and upon every information, bill, demurrer, answer, or other pleading or proceeding, there shall be endorsed the name or firm and place of business of the solicitor or solicitors by whom such writ has been sued out, or such pleading or other proceeding has been filed; and when such solicitors are agents only, then there shall be further endorsed

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thereon the name or firm, and place of business of the principal solicitor or solicitors.

SEC. 3.—Every party suing or defending *in person* is to cause to be endorsed or written upon every writ which he sues out, and upon every information, bill, demurrer, answer, or other pleading or proceeding, his name and place of residence, and also (when his place of residence is more than three miles from the office where such pleading or other proceeding is filed) another proper place, to be called his address for service, not more than three miles from the said office, where writs, notices, orders, warrants, and other documents, proceedings and written communications, may be left for him.

SEC. 4.—In future office copies of pleadings and affidavits are to be made by the solicitor, and examined and certified by the registrar. (v)

(v) This section corresponds with the English Order No. XXXVI., Rules 1, 2, 3, and 6. In a pressing matter during the long vacation, the court took the original affidavits into its custody, and acted upon them as if they were filed, instead of using the office copies. (Attorney-General v. Lewis, 8 Bea. 179.) In other cases the court will not do so. (Jackson v. Cassidy, 10 Sim. 326.)

Taking an office copy of an answer is not a waiver of a contempt; (Woodward v. Twinaine, 9 Sim. 801; Anon, 15 Ves. 174; Mackrell v. Fisher, 14 Sim. 604;) nor of an irregularity in the title. (Fry v. Mantell, 4 Bea. 485.) But see Herrett v. Reynolds, 2 Gif. 409; 8 W. R. 405; 6 Jur. N. S. 880.

Any party requiring an office copy of any pleading or affidavit is to make a written application for the same to the solicitor of the party by whom it has been filed, or on whose behalf it is to be used; and when such party has no solicitor, then to the party himself.

When an application is made for an office copy of any pleading or affidavit it is to be delivered within

REGISTRAR'S OFFICE, &C.
[ORDER XLIII., SEC. V. AND VI.]

Office copies to be delivered in forty eight hours.

forty-eight hours from the time of such demand, (w) and any further time which may elapse before the delivery thereof is not to be computed against the party demanding the same.

(w) See Order XL., sec. 4, which is as follows: "Any party who requires an office copy of an affidavit to be used upon any application is to demand the same from the solicitor of the party by whom such affidavit has been filed, or on whose behalf it is to be used, and such copy is to be ready for delivery within forty-eight hours from the time of such demand, or within such other time as the court may in any case direct."

See also section 4 of the Orders of the 18th day of April, 1859.

Office copies of pleadings and affidavits are to be written on paper of convenient size, in a neat and legible manner, and unless so written the solicitors furnishing them are not to be paid for the same.

Papers may be transmitted through the post office, or by a special messenger.

SEC. 5.—All documents of whatever nature required to be transmitted to the registrar of the court, or any of the deputy registrars, may be so transmitted through the post office, under cover, directed to the registrar or deputy registrar, as the case may be, sealed with the seal of the party required to transmit the same; or they may be forwarded by a special messenger: in that event the messenger is to make oath, before the registrar, or deputy registrar, that he received the document from the hands of the party required to transmit the same—that it has not been out of his possession since he so received it, and that it is in the same state and condition as when it was placed in his hands for transmission; and the name, style and place of residence of such messenger are forthwith to be endorsed upon the document so transmitted by the registrar or deputy registrar, as the case may be.

Bonds for security for costs to be given to the registrar.

SEC. 6.—Bonds executed upon an order for security for costs are to be given to the registrar, or deputy

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SEC. 1
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registrar with whom the pleadings in the suit are filed ; All defendants to be included in the same bond.
all the defendants are to be included in the same bond ;
and the penal sum to be inserted therein is to be fixed The penal sum to be fixed by the court upon the motion for security.
upon the application for security by the judge or master who makes the order. (x)

(x) See the cases cited *supra*, pp. 5-10, on the subject of security for costs. And for form of the bond, &c., see Book of Forms, Part the Second.

SEC. 7.—The amount to be deposited with the registrar of the court on any petition of re-hearing is ten pounds. (y)

(y) See the cases cited *supra*, pp. 80-83, as to re-hearing generally.

SEC. 8.—Money ordered to be paid into court is to be paid into the Commercial Bank, with the privity of the registrar ; the solicitor, or party paying the same is to furnish the bank with a correct copy of so much of the order of court as relates to such payment, with the names of the parties to the suit, and the date of the order. Money ordered to be paid into court to be paid into the Commercial Bank, with the privity of the registrar.

All sums of money to be paid out of court are to be paid out upon the check of the registrar, countersigned by one of the judges of the court, and not otherwise. and to be paid out upon the check of the registrar, countersigned by a judge.

SEC. 9.—All orders of course are to be drawn up by the registrar upon *præcipe*. (z) Orders of course on *præcipe*.

(z) As an order of course cannot be opposed. (*Eyles v. Ward*, *Mosely*, 255,) the proper course, if it be irregular, is to move to discharge it.

Orders of course, must be entered like all other orders. It is essential to an order of course, that it should be made upon a true statement of facts. (*Brignall v. Whitehead*, 30 Eea. 229 ; 8 Jur. N. S. 183.)

SEC. 10.—The evidence read upon the hearing of any cause or matter is not to be stated in the decree or The evidence read upon the hearing of a cause not to be entered

in the decree, but noted in the registrar's book. order, but must be entered in the registrar's book at the time of the hearing. (a)

(a) See section 8 of the Orders promulgated on the 13th day of April, 1859, which is as follows:—"In future the evidence read by each side must be stated distinctly by counsel, in order that the same may be entered by the registrar before the case is closed, in accordance with the order to that effect. When judgment is reserved, the exhibits used upon the hearing must be deposited with the registrar for the use of the court. All exhibits deposited under this order must be described in a schedule, to be prepared by the party depositing the same. The schedule shall be in duplicate, one copy of which, signed by the registrar, shall be handed to the party depositing the exhibits, and the other retained for the use of the court."

Where a plaintiff reads part of a defendant's answer, the whole answer is entered as read. (Manby v. Bewicke, 3 Jur. N. S. 685; Bright v. Legerton, 29 Beav. 69.) As to entering evidence as read in the Registrar's book, see Parker v. Morrell, 2 Phil. 453; Watson v. Parker, 2 Phil. 5; McMahon v. Burchell, 2 Phil. 127; Sherwood v. Beveridge, 2 Coll. 536; Drake v. Drake, 25 Beav. 641; Gee v. Gurney, 8 Beav. 815.) When it does not appear from the Registrar's book that any evidence was read, the court will not on a subsequent application order evidence to be entered as read. (Butt v. Eden, 1 Bro. P. C. 466.)

As to the latitude allowed to Registrars in drawing up decrees, and the variations which they may make therein, see Davenport v. Stratford, 8 Beav. 503; Philips v. Gibbons, 1 V. & B. 184, 186; Taylor v. Milner, 10 Ves. 444.

A clerical error in a decree arising from an accidental slip or omission has been corrected in court on an *ex parte* application, the Registrar being authorised to correct the decree and the entry in the Registrar's book in court. See Askew v. Peddle, 14 Sim. 301. But any error, other than a clerical error, cannot be so corrected. The cause must be re-heard. See Stewart v. Forbes, 16 Sim. 433; Bird v. Heath, 6 Hare, 236; Fyler v. Fyler, 1 Coll. 93; Dodson v. Sammell, 8 W. R. 252; Whitehead v. North, Cr. & Ph. 78; Willis v. Parkinson, 3 Sw. 233; Brookfield v. Bradley, 2 S. & S., 64; Champernowne v. Brooke, 9 Bligh N. S. 199.

An accidental slip, such as the omission of the usual direction to settle the conveyance may, it seems, be supplied by a petition. (Turner v. Hodgson, 9 Beav. 265; Trevelyan v. Charter, 9 Beav. 140; Hughes v. Jones, 26 Beav. 24.)

Accounts and enquiries directed by a decree to be numbered.

SEC. 11.—Where accounts are directed to be taken, or enquiries to be made by any decree or order, each direction is to be numbered, so that, as far as may be, each distinct account and enquiry may be designated by a number, and such order may be in the form set forth in schedule Q., appended hereto, with such variation as the circumstances of the case may require. (b)

(b) Schedule Q is as follows:—

SCHEDULE Q.

The court doth order that the following accounts and enquiries be taken and made, that is to say:

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1st. An account of the personal estate not specifically bequeathed of A. B. deceased, the testator in the pleadings mentioned come to the hands of, &c.

2nd. An account of the said testator's debts.

3rd. An account of the said testator's funeral expenses.

4th. An account of the said testator's legacies.

5th. An enquiry, what parts, if any, of the said testator's personal estate are outstanding or undisposed of.

And it is ordered that the said testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses in a due course of administration, and then, in payment of his legacies.

And it is ordered that the following further accounts and enquiries be taken and made, that is to say :

6th. An enquiry what real estate the said testator was seized of or entitled to at the time of his death.

7th. An enquiry what incumbrances affect the said testator's real estate.

8th. An account of the rents and profits of the said testator's real estate received by, &c.

And it is ordered that the said testator's real estate be sold. And it is ordered that the further consideration of this case be adjourned, and any of the parties are to be at liberty to apply.

This schedule is the same as the schedule to English Order XXIII., Rule 15; and section 11 of this Order is substantially a copy of that Rule.

SEC. 12.—Interlocutory orders are not to be enrolled. Interlocutory orders are not to be enrolled.
Decrees or decretal orders are not to be enrolled until the final order or decree in the cause has been pronounced. Decrees, &c., not to be enrolled until the final decree has been pronounced.
When the final decree or order is entered in the registrar's book he is to state in the margin of the book the date at which such entry was made; and after the expiration of thirty days from the date of such entry, if no petition for re-hearing has been in the mean time filed, the registrar, at the instance of any party to the cause, is to attach together the bill, pleadings, and other proceedings in the cause, and is to annex thereto a fair copy of the decree or decretal order signed by the chancellor, and countersigned by the registrar, and the papers and proceedings so annexed and signed are to remain of record in his office, and such filing is to be deemed and

Manner of enrolment. taken to be an enrolment of the decree for all purposes. (c)

(c) It is not necessary to petition to enrol decrees no matter what time has elapsed. (Anon., 1 Grant, 168.)

The effect of enrolling the decree is to make it a record of the court, and to prevent a re-hearing of the cause.

A decree may be enrolled notwithstanding an abatement of the suit. (Gartside v. Isherwood, 2 Dick. 612; Carrington v. Holly, there cited; Sheffield v. Duchess of Buckingham, West. Rep. 678; Amb. 586; but see Bertie v. Lord Falkland, 1 Dick. 25.)

The enrolment of a decree will be vacated in case of surprise accompanied by *malâ fides*. (Wright v. Wright, 1 Ves. 409; 1 Ves. Sr. Supp. 158; and see 1 Ves. 326; Stevens v. Guppy, 1 T. & R. 173; Parker v. Dee, 3 Sw. 529; 1 Rep. temp. Finch, 123; 2 Ch. Ca. 200; Anon., 1 Vern. 131; Enraght v. Fitzgerald, 1 Dr. & War. 72; Belguy v. Chorley, 1 M. & K. 640; Barnes v. Wilson, 1 R. & M. 486; Hargrave v. Hargrave, 3 M. & G. 348; Wildman v. Lade, 4 DeG. & J. 401.)

And see further as to vacating enrolment on the ground of *malâ fides* or otherwise. (Williams v. Page, 1 DeG. & J. 561; 5 W. R. 854; Wickenden v. Rayson, 25 L. J. Ch. 162; Backhouse v. Wyld, 3 Jur. N. S. 393; Pearce v. Lindsay, 7 W. R. 474; 5 Jur. N. S. 361; 33 L. T. 175; 4 DeG. & J. 211.)

As a rule, after enrolment the decree cannot be altered, except where the error is apparent on the face of the decree, under sec. 17 of Order IX. of Orders of 1853. See Weston v. Haggerston, Coop. Rep. 134; Spearing v. Lynn, 2 Vera. 376; Yow v. Townsend, 1 Dick. 59; Viney v. Chaplin, 7 W. R. 1. 159; as to in what cases a decree will be amended after enrolment.

As to opening a foreclosure after enrolment of decree, see Ford v. Wastell, 2 Ph. 591; Thornhill v. Manning, 1 Sim. N. S. 451.

The order on the petition for re-hearing must be *served* before the enrolment. (Dearman v. Wyoh, 4 M. & Cr. 550; Stevens v. Guppy, T. & R. 178; Groom v. Stinton, 2 Ph. 384.) And see Pearce v. Lindsay, 4 DeG. & J. 211, from which it would appear that the cause should be set down for re-hearing and notice given within the thirty days.

DEPUTY MASTERS AND DEPUTY REGISTRARS.

XLIV.—Deputy masters and deputy registrars respectively are to perform the duties of their several offices in the same manner, and under the same regulations, as the like duties are performed by the master and registrar respectively; and all orders, rules and regulations, in force respecting the master and registrar respectively, and respecting the regulations of their respective offices, are to be in force and applicable to

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DEPUTY MASTERS AND DEPUTY REGISTRARS.
[ORDER XLIV., SEC. II., III., AND IV.]

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the deputy masters and deputy registrars respectively, of masters and registrars respectively. in relation to such duties as they are hereby required to perform; and the like sums and fees payable to the master and registrar respectively, are to be payable to the deputy masters and deputy registrars respectively in relation to similar matters. (d)

(d) See as to duties of the master and the registrar respectively, *supra*, pp. 184, *et seq.*, and pp. 206, *et seq.*

SEC. 2.—A bill of complaint may be filed either with the registrar or with a deputy registrar, at the option of the plaintiff; but all the pleadings in any cause must be filed at the same office; and where a bill is filed in the office of a deputy registrar the endorsement thereon must be varied accordingly. (e)

(e) See as to filing bill of complaint, page 27, *supra*.

SEC. 3.—When a bill is filed with a deputy registrar, the deputy master and deputy registrar respectively in the county where such bill has been filed are to have all such powers and authorities in relation to such suit as belong to the master and registrar respectively. (f)

(f) See pp. 184, *et seq.*, and pp. 206, *et seq.*, *supra*.

SEC. 4.—In addition to the powers and authorities conferred upon him by the previous section, the deputy master in the county where the bill has been filed is to hear and dispose of all applications in the progress of such suit, for the following purposes, viz.:

(1.) To appoint guardians *ad litem* for infants.

(2.) For time to answer or demur.

(3.) For leave to amend before replication.

(4.) To postpone the examination of witnesses, or to allow further time for the production of evidence.

(5.) For security for costs. (g)

(g) See pp. 146, 147, *supra*.

Orders of course
to be drawn up
by the deputy
registrar.

SEC. 5.—All orders in the progress of a cause which are drawn up by the registrar without the special direction of the court may be drawn up by the deputy registrar with whom the bill is filed. (h)

(h) See pp. 211, 212, *supra*.

Deputy registrar
to keep a book
to be called "The
Solicitor and
Agent's Book."

SEC. 6.—Each deputy registrar is to keep in his office a book to be called "The Solicitor and Agent's Book," in which each solicitor residing elsewhere than in the county in which such deputy registrar's office may be, is to specify the name of an agent, being a solicitor of this court, and having an office in the city or town where the office of such deputy registrar is situated, upon whom whom all writs, pleadings, notices, orders, warrants, and other documents, and written communications in relation to proceedings conducted in the office of the deputy master or deputy registrar of such county, may be served.

All writs, pleadings, notices, orders, warrants, and other documents and written communications in this section specified which do not require personal service upon the party to be affected thereby may be served upon his solicitor residing in the county where such proceedings are conducted, or, where such solicitor does not reside in the county where such proceedings are conducted, then upon the agent named in "The Solicitor and Agent's Book," as herein provided. And if any such solici-

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COSTS.

[ORDER XLV., SEC. I.]

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tor neglect to cause such entry to be made in "The Solicitor and Agent's Book," the leaving a copy of any such writ, pleading, notice, order, warrant, or other document or written communication for the solicitor so neglecting as aforesaid in the office of such deputy registrar, is to be deemed sufficient service. (i)

(i) See pp. 206, *et seq.*, *supra*.

COSTS. (k)

XLV. Upon interlocutory applications, where the court deems it proper to award costs to either party, it may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid. And the same may likewise be done upon such proceedings before the court or in chambers as have heretofore been matters of reference to the master.

May be awarded in gross instead of taxed costs.

And it shall also be competent for the deputy master, upon disposing of applications made to him under order XLIV., in like manner to direct payment of a sum in gross in lieu of taxed costs, and to direct by and to whom such sum in gross is to be paid.

If upon the taxation of costs it should appear to the master that any proceedings have been taken unnecessarily, and which were not calculated to advance the interests of the party on whose behalf the same were taken, it shall be the duty of the master to disallow the costs of such proceedings, as well on the taxation of costs between solicitor and client, and as between solicitor and client, as on a taxation between party and party, unless the master shall be of opinion that such proceedings were taken by the solicitor because they were in his judgment conducive to the interests of his client. (l) It

Costs of unnecessary proceedings.

shall not be the duty of the master, on a taxation of costs between a solicitor and his client, to disallow to the solicitor his costs of such proceedings where it is made to appear that such proceedings were taken by the desire of the client, after being informed by his solicitor that the same were unnecessary and not calculated to advance the interests of the client; but the costs of such proceedings are not to be allowed in any case where, according to the present practice and rules of taxation, the same would not be allowed.

(k) This order as to "Costs," and the powers of the master thereby given, has been altered by the following Orders promulgated since June, 1853, and to which reference must be made.

By the Orders of the 6th February, 1858, it is provided as follows:—

"Where a mortgagee has proceeded at law upon his security, he shall not be entitled to his costs in equity, unless the court, under the circumstances, shall see fit to order otherwise."

And by the Orders of the 18th April, 1859, as follows:—

"IV. From and after the first day of July next, every bill and answer filed, and every affidavit to be used in any cause or matter, shall be written in a plain legible hand, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any bill, answer or affidavit, or part of any bill, answer or affidavit substantially violating this order; nor shall any affidavit violating this order be used in support of, or opposition to, any motion, without the express permission of the court."

And by the Orders of the 29th June, 1861, as follows:—

"TAXATION OF COSTS.

Where costs are awarded to be paid, it shall be competent to the master in ordinary to tax the same, without any express reference to him for that purpose."

And by the Orders of the 28th April, 1862, as follows:—

"RE-TAXATION OF COSTS.

It shall be competent for any party against whom costs have been taxed by a deputy master of this court, to obtain as of course an order for a re-taxation of the same before the taxing officer of this court at Toronto.

It shall be the duty of the party obtaining such order to deposit with the deputy master or registrar and with whom the papers are filed, a sufficient sum to cover the expenses of transmitting the same to Toronto, and of the return thereof.

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In case less than one-twentieth be taxed off upon a re-taxation, the costs of such re-taxation shall be added to the bill already taxed.

This Order is to apply to bills of costs already taxed, as well as to bills that may be hereafter taxed, but it is not to apply to cases where the costs have been paid, or final proceedings have been taken upon the taxation of costs already had; process for the levying of such costs is not to be deemed a final proceeding within the meaning of this order."

Where the master exercised his discretion, according to the circumstances of the case, without proceeding upon any general principle, a petition to renew his taxation was dismissed. (*Friend v. Solly*, 10 Bea. 329; *Re Catlin*, 18 Bea. 508.) Where costs have been wrongly omitted from the taxation, the taxation will be ordered to be reviewed. (*Greenwood v. Churchill*, 14 Bea. 160; *Heming v. Leifchild*, 8 W. R. 352; 2 L. T. N. S. 350; affirmed on appeal, 9 W. R. 174.)

As to the province of the taxing-master see *Turner v. Turner*, 7 W. R. 573; *Re Whalley*, 20 Bea. 576; *Re Congreve*, 4 Bea. 87; *Re Hubbard*, 23 Bea. 481; *Re Catlin*, 18 Bea. 508; *Alsop v. Lord Oxford*, 1 M. & K. 564; *Re Colquhoun*, *ex parte* Ford, 1 Sm. & Gif. App. i.; on appeal, 5 DeG. M. & G. 85; 23 L. J. Ch. 515; *Frazer v. Thompson*, 1 Gif. 337; on appeal, 4 DeG. & J. 659.

The court will permit service of pleadings to be effected by parties to the suit, and allow the same fees on taxation, as if served by third persons. No practice has ever obtained in this court requiring the proceedings to be served by the sheriff, unless in the case of writs specially directed to him, and there is no good reason why the parties should not be permitted to effect service of their pleadings themselves, as well as by employing third persons to do so; and if allowed to serve the papers it would seem but reasonable that the same fees should be allowed therefor as if the service had been effected by any person other than the sheriff or his officer. (*McClure v. Jones*, 6 Grant's Ch. R. 383.) And in *Pollock v. Perry*, Registrar's notes, 24th December, 1857, the judges directed sums paid for searches and disbursements in county registry office in a foreclosure suit, prior to the filing of the bill, to be taxed, and a considerable amount was allowed. But it was said by the court, that proof should be given that such searches and disbursements were actually made.

As to costs generally see *Daniell's Ch. P.*, 3rd edit., pp. 1027, *et seq.*; and *Smith's Ch. P.* 7th edit., pp. 1055, *et seq.*

A creditor who comes in and proves a claim, establishing his debt under a decree or an order in a suit, is entitled to his costs of so establishing it. If he fails in proving his claim, see *Hatch v. Searles*, 2 Sm. & G. 157; *Yeomans v. Haynes*, 24 Bea. 127. Where there is a deficiency of assets, the costs of the creditors proving will not be payable in the first instance, but will have to be apportioned with their debts. (*Morshead v. Reynolds*, 21 Bea. 638.) As to the plaintiff's costs, see *Flintoff v. Haynes*, 4 Hare, 309; *Read v. Smith*, 4 Bea. 521.

As to the difference between costs as between party and party, and costs as between solicitor and client, see *Daniell's Ch. P.*, 3rd edit., pp. 1082, *et seq.*, and *Smith's Ch. P.* 7th edit., pp. 1081-1084, *et seq.*

A case between husband and wife is not a case for costs. (*Vansittart v. Vansittart*, 4 K. & J. 76.) But the separate estate of a married woman may be liable to costs. (*Murray v. Barlee*, 3 M. & K. 209; *Owens v. Dickenson*, Cr. & Ph. 43, 54, 55; *Re Pugh*, 17 Bea. 336; 23 L. J. Ch. 132.)

As to the costs of the Attorney-General and the Crown, see *Attorney-General v. Earl of Ashburnham*, 1 S. & S. 394; *Attorney-General v. Corporation of London*, 13 Jur.

978; on appeal, 2 M. & G. 247; 14 Jur. 205; *Burney v. Macdonald*, 15 Sim. 6; *Perkins v. Bradley*, 1 Hare, 219; *Kane v. Reynolds*, 23 L. J. Ch. 688; on appeal, 24 L. J. Ch. 321. In England by the act 18 & 19 Vic., ch. 90, the Crown, if successful, gets the costs as between subject and subject, and a defendant is entitled to costs, if successful, against the Crown as against a subject. In this province, however, the rule is very arbitrary; heretofore the decisions of the court have been not to allow costs as against the Crown, if the subject were successful, but to allow costs as against the subject if the Crown succeeded. It would seem to be more equitable if the Crown does not pay, that the Attorney-General should not receive costs.

The Attorney-General never has to pay costs even on interlocutory applications, 20 Vic., c. 2, sec. 1 and 2, does not alter this rule. (*Gibson v. Clench*, Grant's Cham. 69.)

Where a plaintiff files his bill in this court to foreclose a mortgage for a sum within the jurisdiction of county court, equity side, no costs will be allowed to him, even though the defendant resides in a county other than where the land is situate. (*Connell v. Curran*, Grant's Cham. 11; Con. St. U. C., cap. XV., sec. 22 and 23.)

The court will not deal with the question of costs where it does not adjudicate on the subject matter of the suit, as where it refers the matter to arbitration; (*Andrews v. Morgan*, 1 U. C. L. J. 38;) or where the suit has been compromised; (*Nicholls v. Elford*, 5 Jur. N. S. 264; 32 L. T. 221;) but see, however, *Neal v. Winter*, 9 Grant, 261.

Where the plaintiff charges fraud in his bill and fails to establish it, he will get no costs, even though he succeed on other grounds. (*Hughson v. Davis*, 4 Grant, 588; *Engerson v. Smith*, 9 Grant, 16.)

And he must pay the defendant's costs. See *Blest v. Brown*, 10 W. R. 569, where it was held that a plaintiff having introduced into his amended bill allegations of fraud against a defendant, which the evidence failed to support, that though entitled to the relief prayed, he must pay the defendant all the costs of that part of the bill containing such allegations, and the evidence taken thereunder.

Where the defendant's answer is falsified he will not be allowed costs even though the bill be dismissed. (*Jackson v. Jackson*, 7 Grant, 114.)

It would seem that where the plaintiff in a suit institutes a second suit, though he has been ordered to pay the costs of the first suit, yet he will not be prevented from prosecuting the second suit till such costs are paid. (*Street v. Ryckman*, 1 Grant, 215.)

Where a bill was dismissed after a hearing in the usual way, it was held that the defendant was entitled to all his costs though he would have succeeded on a demurrer, there being other questions of fact involved. (*Simpson v. Grant*, 5 Grant, 267; 1 U. C. L. J. 57.)

Where a decree had been pronounced, holding the plaintiff entitled to a certain sum and his costs, and directed, in default of payment, that certain lands should be sold, and in drawing up the decree the costs were ordered to be taxed as between solicitor and client, a motion on default in payment for an order absolute to sell was refused. (*McDuffie v. McDuffie*, Grant's Cham. 4.)

A decree directing costs to be taxed cannot be varied in Chambers, directing them to be taxed as between solicitor and client, such variation can only be made on rehearing. (*Bernard v. Jervis*, Grant's Cham. 24.) A variation inserting a direction to apportion costs can, however, be made in Chambers. (*Ibid.*)

Where a bill is filed against an heir, executor, administrator or devisee, as such, in respect of property descended, they will be entitled to the costs out of the fund,

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COSTS OF DEMURRER.

[ORDER XLV., SEC. I.]

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even though it be insufficient to pay the plaintiff's claim. (*Macrae v. Ellerton*, Eng. 5 U. C. L. J. 95.)

A solicitor's bill for conveyancing is taxable under the Provincial Statute. (*In re McPeasley and Eccles*, 5 U. C. L. J. 279; *In re Eccles*, 6 U. C. L. J. 69.)

In a partition suit the costs will be as between solicitor and client. (*Bernard v. Jervis*, Grant's Cham. 24.)

In *Patterson v. Crawford*, 1 U. C. L. J. 57; a solicitor for several parties to the suit was allowed all his costs.

On an appeal the payment of costs will not be stayed if the respondent be *bona fide* in possession of the property in question. (*Spread v. Newe*, 12 Ir. Ch. R. 385.)

Where a defendant makes a reasonable offer before the suit, which is refused, the plaintiff may be refused his costs though he succeed. (*Daniell's Ch. P.* 3rd edition, 1041; *Bauman v. Matthews*, 4 L. T. N. S. 784; *Colburn v. Simms*, 2 Hare, 543; *Macartney v. Graham*, 2 R. & M. 353; *Millington v. Fox*, 8 M. & C. 352.)

As to what are costs in the cause.—The costs of a motion for an injunction are usually costs in the cause. (*Carruthers v. Armour*, 7 Grant, 34.)

The costs of a commission to take evidence in a foreign country are costs in the cause. (*Colborne v. Thomas*, 4 Grant, 169.)

The costs of an appeal from the master's report are not costs in the cause unless ordered as such. (*Wilkins v. Stevens*, 1 Y. & C. 436.)

As to the costs of a demurrer.—Where a demurrer on the record had been overruled, and a demurrer *ore tenus* allowed, the defendant had to pay the costs of the former, and the court made no order as to the costs of the latter. (*Macintyre v. Connell*, 1 Sim. N. S. 257; *Attorney-General v. Brown*, 1 Sw. 288; *Cooper v. Earl Powis*, 8 DeG. & S. 689; *Mortimer v. Fraser*, 2 M. & C. 173.) But see *Brown v. Douglas*, 11 Sim. 283, where the court refused to give the plaintiff the costs of the demurrer on the record. See also *Newton v. Earl of Egmont*, 4 Sim. 574; *Rump v. Greenhill*, 20 Bea. 512.

Where a demurrer on two grounds fails as to one and succeeds as to another, no costs will be given. (*Benson v. Hadfield*, 5 Bea. 546; *Paine v. Chapman*, 6 Grant, 338.) On reversing an order allowing a demurrer, the costs were ordered to be refunded. (*Oats v. Chapman*, 1 Ves. S. 541.)

But see *Barber v. Barber*, 5 Jur. N. S. 1197; 29 L. J. Ch. 49; 1 L. T. N. S. 21; where a defendant, by one demurrer, demurred to the plaintiff's bill, on the two distinct grounds, of want of jurisdiction and want of equity, the court over-ruled the demurrer, but without costs, as the plaintiff had not fully shewn such a case by her bill as would have entitled her to relief on the hearing.

See *Bothomley v. Squires*, 1 Jur. N. S. 694; *Schneider v. Lizardi*, 9 Bea. 461; *Finden v. Stephens*, 12 Jur. 319; overruling, s. c. 11 Jur. 898; as cases where demurrer allowed without costs.

When a demurrer was filed and the plaintiff submitted within four days, see *Baldwin v. Borst*, Grant's Cham. 182.

If the plaintiff takes out an order to amend after the demurrer set down, thereby submitting to it, the defendant must move *ex parte* for his costs. (*Maackenzie v. Claridge*, 6 Bea. 123; *Turner v. Sampson*, 8 Jur. 1184.) Query, should not the

order be of course? (*Jacobs v. Hooper*, 1 W. R. 61.) This practice is now followed in England, but it has not been adopted in this country.

As to costs of amendment.—Costs of unnecessary amendments are not allowed. (*Burchell v. Giles*, 11 Bea. 84; *Watts v. Manning*, 1 S. & S. 421; *Pledge v. Buss*, *Johns*, 668; 6 Jur. N. S. 695.) Where important allegations contained in the original bill are struck out by the amendment, the plaintiff will have to pay the additional costs occasioned by the amendment. (*Strickland v. Strickland*, 8 Bea. 242; *Bower v. Cooper*, 2 Hare, 408; *Mavor v. Dry*, 2 S. & S. 118.) The proper time for asking for such costs, which ought to be the subject of a special application, is when the cause of complaint arises. (*Mounsey v. Burnham*, 1 Hare, 22.)

As to the costs of motions.—Where a motion for an injunction was ordered to stand until the hearing and the plaintiff failed, on the bill being dismissed with costs it was held that the defendant's costs of the motion were costs in the cause. (*Betts v. Clifford*, 1 J. & H. 74; *Carruthers v. Armour*, 7 Grant's Chancery Reports, 84.) The costs of an interlocutory motion which rests upon affidavits, which may be displaced by evidence in the cause, will, as a general rule, be reserved until the hearing; (*Waring v. Manchester, Sheffield and Lancashire Railway*, 14 Jur. 613, 616; *Jones v. Batten*, 10 Hare, App. xi.) and if the costs are reserved until the hearing, care should be taken to ask for them at the time, for it seems a general reservation of the costs of the suit until further directions will not include the costs of the motion. (*Gardner v. Marshall*, 14 Sim. 588.) And see also *Jones v. Batten*, *supra*. A party too, may have to pay the costs of a motion though partially successful. When he asks for something which he is, and also for something which he is not, entitled to, he pays the costs of the motion though he succeeds. (*Lancashire v. Lancashire*, 9 Bea. 180; *Sturch v. Young*, 5 Bea. 557.) Costs may be given, although not asked for by the notice of motion. (*Clarke v. Jaques*, 11 Bea. 623; *Butler v. Gardener*, 12 Bea. 525; *Dawson v. Jay*, 2 W. R. 598; *Sanders v. Christie*, 1 Grant, 187;) but *semble*, not if the party served does not appear. (*Pratt v. Walker*, 19 Bea. 261.)

Parties served with notice of motion, though not interested, will, as a general rule, be entitled to their costs of appearance. (*Heneage v. Aikin*, 1 J. & W. 377; *Bamford v. Watts*, 2 Bea. 202; *Major v. Major*, 13 Jur. 1, 202; *Shaw v. Forrest*, 20 Bea. 249.)

An order to discharge an irregular order with costs carries the costs of an application to discharge it. (*West v. Smith*, 3 Bea. 492.) An appeal motion, made on new facts and evidence, is, with reference to costs, a new motion. (*Re Joseph & Webster*, 1 R. & M. 496.)

As to costs on dismissing bill for want of prosecution.—See *Finden v. Stephens*, 11 Jur. 898; on appeal, 12 Jur. 819; *Stevens v. Keating*, 1 M. & G. 659; 14 Jur. 157; *Rumbold v. Forteach*, 4 Jur. N. S. 608; *Betts v. Clifford*, 1 Jo. & H. 74.

As to where the dismissal will be without costs, see *Blanshard v. Drew*, 10 Sim. 240; *Knox v. Brown*, 2 Bro. C. C. 186; *Kemball v. Walduck*, 18 Jur. 69; but see *contra*, *Levi v. Heritage*, 26 Bea. 560; 5 Jur. N. S. 215; *Haddon v. Pegler*, 5 Jur. N. S. 1128.

As to allowing a plaintiff to dismiss his own bill without costs, see *Goodday v. Sleigh*, 3 W. R. 87; *Lister v. Leather*, 26 L. J. Ch. 557; 5 W. R. 666; *Hansard v. Hardy*, 18 Ves. 460; *Broughton v. Lashmar*, 5 M. & C. 136.

Where a bill has been dismissed with costs, as against some of the defendants, it cannot be without costs as against the rest. (*Troward v. Attwood*, 27 Bea. 85.)

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Costs in foreclosure and redemption suits.—As a rule a mortgagee is entitled to his costs, so where a subsequent mortgagee who has filed his bill to foreclose offers to consolidate his suit in that of the prior mortgagee who has filed his bill after him, he will be allowed his costs already incurred in such suit. (*Allan v. McDougall*, 6 U. C. L. J. 64; *Goodhue v. Whitmore*, 7 U. C. L. J. 124.)

Where a mortgagee files his bill to foreclose and a question arises at the hearing whether he has not received sufficient to pay off the mortgage, costs will be reserved. (*Gooderham v. DeGrassi*, 2 Grant, 135.)

A mortgagee having omitted to give credit for sums paid to him on account, and his executors claiming a large sum to be due, the mortgagor tendered a certain sum, saying he was willing to pay any additional sum that might be due, after giving him credit for the sums alleged to have been paid, the executors refused the tender and filed a bill to foreclose, and on taking the account the sum of £2 or £3 above the amount tendered was found due, the court ordered the executors to pay costs. (*Cornwall v. Brown*, 3 Grant, 633.)

Where the costs of a foreclosure suit had been increased by making unnecessary parties in the Master's office an application for the usual final order was refused, the additional costs were deducted, and a new day appointed for payment. (*Rice v. Brooks*, Grant's Cham. 71.)

Where a plaintiff holding several mortgages on the same property files separate bills to foreclose, the court will exercise its discretion as to costs, other than the costs of the first suit. (*Noble v. Line*, 5 U. C. L. J. 163.)

Where a mortgagee resists redemption unsuccessfully, the usual order as to costs is that he be paid the costs of an ordinary redemption suit, and that he do pay the costs occasioned by his resisting redemption; (*Isherwood v. Dixon*, 5 Grant, 314;) and where the mortgage is by an absolute deed, and the mortgagee fraudulently sets it up as an absolute purchase, he will have to pay the costs of a suit to redeem; (*LeTarge v. DeTuyll*, 3 Grant, 595;) and see further as to costs where redemption is resisted. (*Harvey v. Tabbutt*, 1 J. & W. 203; *Fisher on Mortgages*, 555; *Seton on Decrees*, 3rd ed., 376.)

Where after the mortgage debt had been reduced to £1 14s. the mortgagee who had taken an absolute deed distrained for £40, claiming that amount to be due, the court refused him his costs of a suit to redeem. (*Long v. Glenn*, 5 Grant, 208.)

Where a mortgagor on a bill to redeem seeks to deprive the mortgagee of his costs a case for such relief should be made on the pleadings, and the question of costs included in the reference. (*Ibid.*)

Where a mortgagee in possession under a Welsh mortgage refused to give any statement of rents received or information as to the amount due, he was ordered to pay the costs of a suit for an account, though a balance was found in his favour. (*Morrison v. Nevins*, 5 Grant, 577.)

Costs in specific performance suits. As to the steps which a vendee seeking specific performance should take before filing his bill so as to entitle him to costs see *Hutchinson v. Rapelje*, 2 Grant, 538; *Healy v. Ward*, 8 Grant, 337.

As a general rule the vendor is entitled to costs from the time of completing a good title; (*Harford v. Parrier*, 1 Mad. 536-8; *Wilkinson v. Hartley*, 15 Beav. 183;) but if specific performance is resisted unsuccessfully on other grounds the vendor will be entitled to costs, without regard to the time of completion of title. (*Croome v. Lediard*, 2 M. & K. 293; *Gibbins v. N. E. Asylum*, 11 Beav. 5.)

It is a general rule in suits for specific performance by the vendee against the infant heirs of the vendor that the decree should be without costs, the guardian's costs being paid by the plaintiff; but if the purchase money be not paid the court will direct payment out of such purchase money. (*Commander v. Gilrie*, 6 Grant, 478.) See further as to costs in suits for specific performance. (*Currah v. Rapelje*, 2 Grant, 542.)

As to the question of costs between a solicitor and his client and the solicitor's lien.—A solicitor is not justified in accepting from his client a gross sum in lieu of taxed costs without adopting some mode of extricating his client from the effect of that pressure which the law assumes while the relation of solicitor and client subsists, such as the intervention of a third party; (*Morgan v. Higgins*, (Eng.), 5 U. C. L. J. 216;) so, also, if a solicitor accept security for a gross sum in lieu of taxed costs, without the intervention of a third party, or otherwise extricating his client from presumed pressure, the security will stand only for taxed costs. (*Ibid.*)

Where a client pays his solicitor's bill under protest in order to obtain papers on which the solicitor has a lien, the objectionable items in the bill should be specified before payment. (*In re Davis*, *ex parte White*, (Eng.), 6 U. C. L. J. 192.)

A solicitor's bill of costs does not carry interest; if the solicitor agrees with his client for interest, he is bound to inform him that such agreement is a special bargain beyond what is sanctioned by law or the ordinary course of the profession. (*Lyddon v. Moss*, (Eng.) 5 U. C. L. J. 289.)

The papers in an application to tax a solicitor's bill, under 18 Vic., c. 175, sec. 20, must be entitled in the matter of such solicitor. See sec. 25, and *Duggan v. Cotton*, 8 U. C. L. J. 15.

Where a solicitor offers to reduce his bill, he is not chargeable with the costs of the taxation unless the bill be reduced one-sixth by taxation independent of the voluntary reduction. (*In re Freeman*, *Craigie and Proudfoot*, *Grant's Cham.* 102; 8 U. C. L. J. 189.)

Where a solicitor irregularly proceeds to tax his costs in the absence of his client, the court, on a petition by the client, filed seven years afterwards, may order a re-taxation and the solicitor to pay costs of the application. (*Clarke v. Manners*, *In re Manners*, 4 Grant, 482.)

The lien of the solicitor for his costs is subordinate to the equities between the parties to the suit, so where money is decreed to be paid by the plaintiff to the defendant, and costs by the defendant to the plaintiff, the party entitled to the larger sum can insist upon the amounts being set-off one against the other; *secus* however, where there are two debts due in different rights. (*Wilson v. Switzer*, *infra*.)

If, however, the claim for set-off be for costs *at law* the set-off will not be allowed, so as to defeat the lien of the attorney-at-law, unless such lien can never arise by reason of an injunction staying the proceedings at law. (*Wilson v. Switzer*, *Grant's Cham. R.* 75.)

As against third parties the solicitor's lien attaches only on property recovered in the suit, and not on other property of the client in the solicitor's possession. (*Verity v. Wyld*, (Eng.), 5 U. C. L. J. 289.)

A solicitor's right of lien does not preclude a fair compromise, but where the client is about to receive money to the exclusion of the solicitor, the solicitor may apply to the court to provide for his costs. (*Ibid.*; and see *Brunsdon v. Allard*, (Eng.), 6 U. C. L. J. 22.)

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So where a solicitor notified a party decreed to pay money to his client of his claim for costs against the client, it was held that the service of a garnishee order on the party so decreed to pay did not affect the lien of the solicitor created by the notification. (*Symson v. Prothero*, (Eng.), 3 U. C. L. J. 175.)

(2) The court leaves to the taxing-master the province of distinguishing what parts are unnecessary. (*Moore v. Smith*, 14 Bea. 396; *Woods v. Woods*, 5 Hare, 229; *Burchell v. Giles*, 11 Bea. 34.) See also as to this section, *Re Skidmore's Estate*, 1 Jur. N. S. 696; 24 L. J. Ch. 711; *Re Manchester and Leeds Railway Company*, 8 Hare, 31; *Re Courtois' Will*, 10 Hare, App. lxiv.; *Hyder v. Coleman*, 21 L. J. Ch. 692; *Re Bedminster Charities*, 12 Jur. 665; *Re Lilley's Trusts*, 17 Sim 110; *Canning v. Bell*, 13 L. J. Ch. 304. Costs incurred in issuing process of contempt will not be allowed on taxation as between party and party. (*Attorney-General v. Carrington*, 6 Bea. 460.)

The master under this section may strike off such parts of the costs as might have been occasioned by an improper mode of framing the pleadings, and the affidavits on both sides. (*Hanslip v. Kitton*, 8 Jur. N. S. 835.) He may look into the pleadings and tax the costs occasioned by any unnecessary amendments. (*Burchell v. Giles*, 11 Bea. 34; *Watts v. Manning*, 1 S. & S. 421; *Pledge v. Buss*, Johns. 668; 6 Jur. N. S. 695.) And see *Strickland v. Strickland*, *Bower v. Cooper*, *Mavor v. Dry*, *Mounsey v. Burnham*, all cited *supra*.

SEC. 3.—Where costs are to be taxed as between party and party, the master may allow to the party entitled to receive such costs the like costs as are taxable where costs are directed to be taxed as between solicitor and client in—

Advising with counsel on the pleadings, evidence, and other proceedings in the cause.

Procuring counsel to settle and sign such pleadings and petitions as may appear to have been proper to be settled by counsel.

Procuring and attending consultations of counsel.

The amendment of bills.

On proceedings in the master's office.

Supplying counsel with copies or extracts from necessary documents.

But in allowing such costs, the master is not to

COSTS.—SOLICITOR.

[ORDER XLV., SEC. III.]

allow such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for defending his rights; or which appear to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party.

The following fees and disbursements may be charged and allowed in respect of the services hereinafter enumerated:

SOLICITOR.

Instructions for suit.....	£0 10 0
Instructions to defend.....	0 10 0
Instructions for petition where no bill filed....	0 10 0
Letter of notice before instituting suit.....	0 2 6
Drafting bill, not exceeding 20 folios, including copy to keep.....	1 0 0
For every additional folio above 20, (to be allowed in the discretion of the master,) including copy to keep, per folio.	0 1 0

[No greater sum than 30s. to be taxed by the master for drawing any bill, without the special direction of one of the judges of the court upon the application of the solicitor requiring the same, for which application no charge is to be made.]

Drafting answer or other pleading, petition, or special affidavit, per folio.....	0 1 0
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[No greater sum than 30s. to be taxed for drawing any answer, petition, or affidavit, without the special direction of one of the judges of the court, as provided for in the case of bills; and no greater sum is to be allowed for drawing any answer, petition or affidavit, than would have been taxed irrespective of this order.]

Engrossed copies to file, copies to serve (other than copies on which a fee is paid to the

COSTS.—SOLICITOR.
[ORDER XLV., SEC. III.]

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	master or registrar, for reading over or authenticating the same) each per folio.....	0	0	6
	Copies of orders or other papers or documents, not office copies, required to be served, per folio	0	0	6
	Office copies to be authenticated by the registrar, and engrossment of affidavit read over by the master to the deponent, per folio....	0	0	5
	Affidavits of service, including attendance to swear	0	2	0
	Præcipe for any process including attendance	0	1	3
	Special attendance on the master's warrant or appointment, or on examination of witnesses, or on hearing of cause or demurrer or special motion.....	0	5	0
	When the hearing shall exceed one hour, then for every additional hour which shall be occupied by such hearing, and at which the solicitor shall be present in court, provided the same be noted in the registrar's book, or be proved by affidavit, (such affidavit to be without charge,) the same not to exceed 20s	0	5	0
	For every additional hour beyond one hour in the master's office.....	0	5	0
	For every additional hour in the examination of witnesses where no counsel employed....	0	5	0
	Attending consultations of counsel, per hour...	0	5	0
	[No special attendance to be allowed to a solicitor on proceedings upon which he appears also as counsel.]			
	Appointment to settle minutes, or to pass decree or order, copy and service.....	0	3	0
	For every hour's attendance before the regis-			

COSTS.—SOLICITOR.

[ORDER XLV., SEC. III.]

trar by his appointment, on settling minutes, the same being noted by the registrar.....	0	5	0
For every hour's attendance before the regis- trar by his appointment, on passing decree or special order, the same being noted by the registrar.....	0	5	0
Where minutes settled, or decree or special order approved of or passed between the solicitors after appointment issued by the registrar	0	5	0
[In such case no fee to be allowed to either party as for attendance before the registrar in respect of the same settling or passing.]			
Fee on all writs and orders of court to the party obtaining the same.....	0	5	0
Instructions for brief.....	0	5	0
Brief, per folio, including briefing and fair copy, subject to be reduced by the master, if the same contain superfluous matter, or be of unnecessary length.....	0	0	6
Observations, or other original matter in brief, per folio.....	0	1	0
[No fee or brief for second counsel to be allowed, unless by order of a judge; and a brief of depositions or special affidavits to be allowed only where fee and brief for second counsel is taxed, and then only by the direction of a judge upon special application.]			
Advertisement for sale of real or personal estate, under the direction of the court, in- cluding all copies, except for printing.....	0	5	0
Copies for printing, per folio.....	0	0	6
Fee on conducting sale—including arrange- ments with auctioneer, correcting proof- sheet, (if any,) and attending at sale.....	1	5	0
For every hour beyond three occupied at such sale.....	0	5	0

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COSTS.—COUNSEL.
[ORDER XLV., SEC. III.]

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Drawing bill of costs and attending taxation...	0	5	0
Drawing judge's appointment, and attending for his signature, and to serve.....	0	5	0
Every necessary attendance.....	0	1	3
Postages—the amount actually disbursed.			

[The sum allowed for copying and briefing shall be sixpence per folio, except where authenticated by the registrar, or read over by the master: provided that the same shall not in any case exceed one half of the amount which shall be allowed for drawing what shall be so copied or briefed.]

COUNSEL.

On argument at judges' chambers in cases proper for the attendance of counsel, to be increased at the discretion of the judge.....	0	10	0
On settling and signing pleadings and petitions respectively, where from their special nature the master shall think the pleading or peti- tion a proper one to be settled by counsel...	0	10	0
On consultations.....	1	5	0
On special applications to the court, arguing demurrer or other special argument, or at the hearing of a cause.....	1	5	0
To be increased, in the discretion of the mas- ter, to.....	5	0	0

[Any fee exceeding £5, to be allowed only by order of a judge, to be obtained at the cost of the solicitor making the application.]

MASTERS IN ORDINARY AND DEPUTY MASTERS; MASTERS
AND MASTERS EXTRAORDINARY.

Every summons or warrant.....	0	1	3
Administering oath, or taking affirmation.....	0	1	0
Marking every exhibit.....	0	1	0
Drawing depositions, reports or orders, per folio	0	1	0

COSTS.—MASTER.—REGISTRAR.

[ORDER XLV., SEC. III.]

One fair copy when necessary, per folio.....	0	0	6
Copy of papers given out when required, per folio.....	0	0	6
Every attendance upon a reference.....	0	5	0
For each additional hour.....	0	5	0
Every certificate.....	0	2	6
Filing each paper.....	0	0	4
Taxing costs, including attendance.....	0	5	0
Making up and forwarding answers and depositions.....	0	1	3
Every special attendance out of office, within two miles.....	0	5	0
Every additional mile above two.....	0	1	0
Reading over affidavit, per folio.....	0	0	1
Matter added, per folio.....	0	1	0

REGISTRAR.

Entering parties' names and filing bill, answer or demurrer.....	0	2	6
Entering and filing all other pleadings, interrogatories and depositions, or other evidence	0	1	0
Filing and registering affidavits, exhibits, or other papers.....	0	0	4
Subpœna, including filing præcipe.....	0	2	6
Special writ, writ of commission.....	0	5	0
Office copy of papers required to be given out, per folio.....	0	0	6
Examining and authenticating same, when office copy prepared by solicitor, per folio.	0	0	1
Attendance on appointment of guardian.....	0	2	6
Amendment of record when re-engrossment not necessary, per folio.....	0	1	0
Drawing fiat on petition.....	0	1	0
Attending a judge for his signature to any document or paper.....	0	1	3

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COSTS.—REGISTRAR.—SHERIFF.—CORONER.
[ORDER XLV., SEC. III.]

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Making up and forwarding interrogatories....	0	1	3
Setting down cause	0	2	6
Certificate of pleadings being filed	0	2	0
Certificate of state of cause.....	0	2	6
Drawing minutes of decree or special order, per folio.....	0	1	0
Drawing decree or order, per folio.....	0	1	0
Entering same, per folio.....	0	0	6
Fee on payment of money into court.....	0	1	3
Fee on payment of money out of court.....	0	1	3
Fee on admission of solicitor.....	0	5	0
Certificate on each office copy of the time of filing bill.....	0	1	3
Searching files in office.....	0	1	0
Commission appointing deputy master or regis- trar, or master extraordinary (m).....	0	10	0

(m) By Order of court promulgated on the 30th of April, 1859, the fees and disbursements which may be charged by and allowed to sheriffs and coroners in respect of the services therein enumerated are provided for. The Order is as follows:—

SATURDAY, 30TH APRIL, 1859.

The judges, in pursuance of the authority vested in them under and by virtue of the statute in that behalf, do hereby order and direct that the sheriffs and coroners, in their several counties, shall be entitled to receive and take for the several services hereinafter mentioned, the sums specified for the same, and no other or greater fees or allowance:

RECEIVING, filing, entering, and endorsing every paper.....	£0	1	3
RETURN of all Process and Writs except Subpoenas.....	0	2	6
WARRANT to Bailiff on Writ not executed by Sheriff or Deputy	0	2	6
SERVING each Office Copy Bill, including affidavit of service	0	5	0
SERVING each Warrant, Notice, Certificate, Subpoena, or other paper.....	0	2	6
NE EXEAT—Arrest on, when amount endorsed under £50.....	0	5	0
£50, and under £100.....	0	10	0
£100 and over.....	1	0	0
ATTACHMENT—not defined, arrest on.....	0	10	0
Arrest upon attachment in the nature of an execution, when the sum endorsed is under £50.....	0	5	0
Over £50, and under £100.....	0	10	0
£100 or over.....	1	0	0

Besides Poundage for sums endorsed, when sum endorsed is under £100.....5 per cent.

Exceeds £100, but is less than £1000, 5 per cent. for the first £100, and 2½ per cent. for the residue. £1000 and over, 1½ per cent. on whatever exceeds £1000, in addition to the poundage allowed up to £1000.

SEQUESTRATION—Upon seizure of estate and effects under Writ of Sequestration..... 0 10 0

Schedule of goods taken in execution, including copy for defendant, if not exceeding 5 folios..... 0 5 0

Each folio above 5..... 0 0 5

Removing or retaining property, reasonable and necessary disbursements, and allowances to be made by the master, or by order of the court or judge.

Poundage upon sequestration, followed by sale.

Where amount made under £100, at..... 5 per cent.

£100, but under £1000, 5 per cent. for the first £100, 2½ per cent. for the residue.

£1000, and over, 1½ per cent. on whatever exceeds £1000, in addition to the poundage allowed up to £1000, in lieu of all fees and charges for services and disbursements, except mileage in going to seize, and disbursements for advertising, and except disbursements necessarily incurred in the care and removal of property, to be allowed by the master in his discretion.

FOR SERVICES NOT SPECIFIED—The like charges as are allowed at common law for analogous services.

By Order I. of the Orders of court promulgated on the 13th day of April, 1859, the fee for setting down causes other than those *pro confesso* is increased. The Order is as follows:

"I. That from and after the first day of July next, the fee payable to, and to be received by the registrar of this court, on the setting down of each cause, other than those ordered to be taken *pro confesso* shall be the sum of ten shillings."

And by Order III. of the Orders promulgated on the 10th day of January, 1863, the fees payable to a deputy registrar for setting down a cause for examination of witnesses and hearing is fixed at £2 for each case set down. This Order abrogates the Order promulgated on the 6th day of February, 1858, as to fees payable to deputy registrars for setting down causes for examination of witnesses.

PROCESS.

XLVI.—No writ of execution shall be issued for the purpose of requiring or compelling obedience to any order or decree of the court; but the party required by

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such order or decree to do any act, shall, upon being ^{Writ of execution} ~~abolished.~~ duly served with such order or decree, be held bound to do such act in obedience to such order or decree. (n)

(n) English Consolidated Order XXX., Rule 4.

The party in contempt may be heard to shew that proceedings, subsequent to the order placing him in contempt, are irregular. (*Morrison v. Morrison*, 4 Hare, 590; *King v. Bryant*, 3 M. & Cr. 191; and see *Wilson v. Bates*, 3 M. & Cr. 197; *Hawkins v. Hall*, 1 Bea. 73; 4 M. & Cr. 280.)

SEC. 2.—If any party, who is by any order or decree ordered to pay money, or to do any other act in a limited time, shall, after due service of such order or decree, refuse or neglect to obey the same according to the exigency thereof, the party prosecuting such order or decree shall, at the expiration of the time limited for the performance thereof, upon filing with the registrar an affidavit of the service of such order or decree, and of the non-performance thereof, be entitled without further order to a writ or writs of attachment against the disobedient party; and in case such party shall be taken or detained in custody under any such writ of attachment without obeying the same order or decree, then upon the sheriff's return that the party has been so taken or detained, the party prosecuting such order or decree shall be entitled without further order to a commission of ^{Attachment.} ~~Sequestration.~~ sequestration against the estate and effects of the disobedient party. (o)

(o) The attachment must be entered in the registrar's book before it issues. (*Smith v. Thompson*, 4 Mad. 179.) The seizure of the defendant's person under an attachment, does not destroy the plaintiff's right to proceed against his property. (*Roberts v. Ball*, 5 Com. & G. 168.)

By C. S. U. C., ch. XXIV., sec. 13, "an act respecting arrest and imprisonment for debt," a party cannot be attached for non-payment of money, which must be recovered by *fi. fa.* as at law. (See sec. 19.)

Before this act, where a party was ordered to pay money into court, his becoming insolvent would not prevent his being arrested for contempt, on disobedience of the order. (*Brewer v. Rose*, 2 U. C. Jur. 8.)

A married woman being assumed to be under the control of her husband, upon default by her, the husband, and not she, will be in contempt. (*Maughan v. Wilkes*, Grant's Cham. 91; 8 U. C. L. J. 186.) Where an application for an attachment against a married woman for not bringing in accounts into the master's office was refused on the above ground.

It is not necessary in proceeding against a corporation for contempt to sue out a writ of *distringas*, the proper course is by orders *nisi* and absolute for a sequestration. (*Attorney-General v. Brantford*, Grant's Cham. 26.)

On moving absolute an order *nisi* to deliver an abstract of title to the plaintiff or his solicitor, it must be shewn that it has not been delivered to either party named in the order. (*Dick v. McNab*, Grant's Cham. 31.)

Effect of contempt.—As a general rule a party in contempt cannot take any step in the cause till he has cleared his contempt by doing the act required, and paying the costs of contempt.

A party in contempt, however, is entitled to move to discharge an order made adversely to him. (*Futvoye v. Kennard*, 3 L. T. N. S. 687; 2 Giff. 110.)

And generally to take any proceedings to clear his contempt.

Where a stay of proceedings was ordered against a plaintiff in contempt until clearance of contempt, and the plaintiff had not cleared his contempt, a motion by the defendant to dismiss for want of prosecution was refused as irregular. (*Futvoye v. Kennard*, 2 Giff. 533; 30 L. J. Ch. 262.)

Clearing contempt.—A party in contempt in order to clear his contempt, should do the act required, and pay the costs of contempt. So where a party in contempt for not bringing in accounts into the master's office filed the accounts, but did not pay the costs of contempt, an order was granted *ex parte* to remove the accounts filed in order that the party might be proceeded against for contempt. (*Corbett v. Meyers*, Grant's Cham. 26.)

For forty days before and after each session, a member of the Provincial Parliament is privileged from arrest for contempt. (*Wadsworth v. Boulton*, 2 U. C. Cham. 76; *Meyers v. Harrison*, 4 Grant, 143.)

A solicitor while proceeding to attend an appointment with a person for whom he is acting professionally, is privileged from arrest under attachment. (*Re Barrow*, (Eng.) 4 U. C. L. J. 230; *Eyre v. Barrow*, (Eng.) 5 U. C. L. J. 45.)

Query, whether the sheriff can be compelled to serve any papers other than process issuing from court; (*Porter v. Gardner*, Grant's Cham. 16;) the proper course where a sheriff will not return papers sent to him for service, is to give notice to the sheriff that unless the papers are returned by a day named, a motion will be made for an order that the sheriff do return them. (*Ibid.*)

When an attachment cannot be executed.

SEC. 3.—If an attachment cannot be executed against such party so refusing or neglecting to obey such order or decree, by reason of his being out of the jurisdiction of the court, or of his having absconded, or that with due diligence he cannot be found, and the court be satisfied

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by affidavit that such is the case, the party prosecuting such order or decree shall be entitled to an order for a commission of sequestration against the estate and effects of the disobedient party; and it shall not be necessary for this purpose to sue out an attachment in the first instance. (*p*)

(*p*) Property seized under a writ of sequestration cannot be sold without an order for that purpose previously obtained on motion, notice whereof must be given. (*Forbes v. Connolly*, Grant's Cham. 6.)

Where property sequestered is claimed by a third party, on motion an enquiry by the master will be directed as to ownership. (*Re Brennan*, 2 Grant, 274.)

On the sheriff's return of "*non est inventus*," and on affidavit to that effect, sequestration will issue at once under this order, which is similar to the 188th of V. C. Jamieson's orders. (*Prentiss v. Brennan*, 1 Grant, 497.)

SEC. 4.—Commissions of sequestration are to be directed to the sheriff, unless some good reason exists for the contrary. Commission of sequestration, to whom directed.

SEC. 5.—Attachments with proclamations and commissions of rebellion are hereby abolished; and it shall not be necessary, in order to enforce any order or decree, to obtain any order for, or sue out a warrant to, the sergeant-at-arms. (*q*) Attachment with proclamation and commission of rebellion abolished

(*p*) English Consolidated Order XXX., Rule 5.

SEC. 6.—Every order or decree requiring any party to do any act thereby ordered shall state the time after service of the decree or order within which the act is to be done; and upon the copy of the order or decree which shall be served upon the party required to obey the same, there shall be endorsed a memorandum in the words, or to the effect following, namely, "If you, the within named, (*here insert the name of the party*), neglect to obey this order or decree by the time therein limited, Time to be limited by decree or order.

PROCESS.—COSTS.—WRIT OF ASSISTANCE.

[ORDER XLVII., SEC. VII. AND VIII.]

Endorsement. you will be liable to be arrested by the sheriff; and you will also be liable to have your estate sequestered for the purpose of compelling you to obey the same order or decree without further notice." (r)

(r) This section does not apply to process for contempt for default in the master's office.

Where an order of reference to arbitration is obtained, and an award made, the proper course in order to compel obedience to the award is to obtain an order, on notice, (specifying the acts to be performed,) that the party do perform the award within a time limited by the order, which must be endorsed in accordance with this section. (Wilson v. Switzer, Grant's Cham. R. 44.)

It would seem that merely making the award an order of court, though such be endorsed and served personally, is not sufficient to place the party in contempt on default, and it would certainly be insufficient if the award did not limit a time for the performance, as directed by this section. (*Ibid.*)

Subpoena for costs abolished.

Payment of costs, how enforced.

SEC. 7.—Subpoenas for costs are hereby abolished: a decree or order directing the payment of costs is in future to fix a time for such payment; and such decree or order shall be enforced in the same manner as any other decree or order directing the payment of money; for this purpose it shall be necessary to serve only a copy of so much of the decree or order as directs the payment of such costs, and the time to be fixed is to be a certain time after such service. (s)

(s) It would seem that if the order do not fix a time for the payment of the costs payment of them could not be enforced until an order fixing such time had been obtained and duly served. (Saul v. Cooper, 4 Grant, 61.)

Writ of attachment or injunction on decree or order to deliver possession dispensed with.

SEC. 8.—It shall not be necessary to issue any writ of attachment or injunction upon any decree or order for delivery of possession, but the party prosecuting such decree or order, upon filing with the registrar an affidavit of service of the same, and of non-compliance therewith, shall be entitled without further order to a writ of assistance. (t)

(t) In applying for the writ of assistance the affidavit in support of the application

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need not shew an existing non-compliance with the order to be enforced. (Webster v. Taylor, 18 Jur. 869.) For the form of writ, see Book of Forms, Part the Second.

SEC. 9.—No order for the production of deeds, papers, writings or documents, made under the 20th Order of this court, shall require personal service; if the party required to obey the same shall have a solicitor, it shall be sufficient to serve the same upon such solicitor: but any writ or writs of attachment to be issued for disobedience to any such order, must be obtained according to the present practice by orders *nisi* and absolute, and such orders *nisi* must be personally served. (u)

Order for production of papers, how to be served.
Proceedings thereon to be by orders nisi, and absolute.
Order nisi to be personally served.

(u) This section does not apply to production in the master's office.

SEC. 10.—Every person, not being a party in any cause, who has obtained any order, or in whose favour an order has been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause. (v)

Decrees or orders, by or against persons not parties.

(v) See *Heal v. Harper*, 2 Grant, 695, where prior to this order all parties consenting, the Canada Company were ordered to convey property. They had appeared in the master's office under the decree, but it does not appear from the report whether they had been made parties in the Master's office, or not.

XLVII.—The power of the court and of the judge sitting in chambers to enlarge or abridge the time for doing any act, or taking any proceeding in any cause or matter upon such (if any) terms as the facts of the case require, or to give any special directions as to the course of proceeding in any cause or matter, is unaffected by these orders. (w)

Power of court and of judge not affected by these orders.

(w) English Orders No. XXXV., Rule 62, and No. XXXVII., Rule 17. This Order

238 APPOINTMENT OF GUARDIAN AD LITEM BY PARTY.
[ORDERS 6TH JUNE, 1858.]

seems to reserve to the judges, whether sitting in court or in chambers, their inherent right to alter, in special cases, the times limited by the General Orders.

The following cases may be consulted as to the operation of General Orders, and the construction which will be placed upon them. (*Coyle v. Alleyne*, 14 Bea. 171; *Burrell v. Nicholson*, 6 Sim. 212; *Boehm v. DeTastet*, 1 V. & B. 327; *Matthews v. Chichester*, 11 Jur. 49; on appeal from 5 Hare, 207; *Beavan v. Mornington*, 8 W. R. 669; *Ferrand v. Mayor, &c., of Bradford*, 8 DeG. M. & G. 93.) In this latter case it is held that any judge of the court may dispense with the General Order where justice requires.

6TH JUNE, 1858.

I.

The following Orders and parts of Orders, comprised in the General Orders of the third instant, namely, VI, section 9 of IX, section 3 of XII, section 8 of XIII, XV, XVI, XVII, XX, XXV, XXVI, XXVII, XXVIII, XXIX, XXX, XXXI, XXXII, XXXIII, XXXIV, XXXV, XXXVI, XXXVIII, XXXIX, XL, XLI, XLII, XLIII, XLIV, XLV, XLVI—are to take effect from the date hereof, as to all suits, as well those now pending, as those subsequently instituted.

II.

Appointment of
guardian ad
litem by party
himself.

A party desirous of appointing a guardian for him to defend a suit, may go before a judge or master with the proposed guardian, and the judge or master may appoint such guardian if he shall think fit so to do. But he must be satisfied by affidavit that such proposed guardian is a fit person and has no interest adverse to that of the person of whom he is to be the guardian in the matter in question; and if the affidavit is not sufficient for this purpose, he may examine the proposed guardian, or the person making the affidavit, *viva voce*, or require further evidence to be adduced until he is satisfied of the propriety of the appointment. (x)

(x) See *supra* pp. 71-74.

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SOLICITORS STRUCK OFF THE ROLL.— MOTION FOR DECREES. 239
[ORDERS 6TH FEB., 1854, AND 30TH APRIL, 1855.]

MONDAY, 6TH FEBRUARY, 1854.

It is ordered, that whenever hereafter any solicitor of this court shall be struck off the roll of solicitors, or be prohibited from practising as a solicitor, by order of this court, for malpractice or misconduct as a solicitor, or other sufficient cause, the registrar of this court shall forthwith certify such dismissal or prohibition, and the grounds thereof expressed in general terms under the seal of this court, and shall transmit such certificate to each of the superior courts of Upper Canada.

And that this court on receipt of any similar certificate from the Court of Queen's Bench, or Court of Common Pleas, of any attorney of either of the said courts respectively, having been struck off the roll of such court, or prohibited from practising therein, shall thereupon take proceedings for striking such person, being a solicitor of this court, from the roll of solicitors; or for prohibiting his practising therein according to the course and practice, and in like manner and under like circumstances observed in similar cases in the superior courts in England.

When a solicitor is struck off the roll, the same is to be certified to Superior Courts of U. C.

On receipt of similar certificate from Q. B., or C. P., party to be struck off the roll of solicitors.

MONDAY, 30TH APRIL, 1855.

It is ordered, that in future all motions for decrees, and motions by way of appeal from the master's report, are to be set down in a paper of motions and will be called on in their order, after other motions are heard. (y)

Motions for decrees, and by way of appeal to be set down.

(y) Motions for decrees and appeals from Master's reports are now by Order of 28th of April, 1862, heard on Tuesdays and Wednesdays in each week. And by the same Order it is provided that lists are to be prepared by the registrar. This Order may be read with the Order of 28th of April, 1862, but it is in effect superseded by it, as by the last mentioned Order it is provided that "other motions" are to be heard on Mondays. See Order of the 28th day of April, 1862, *infra*.



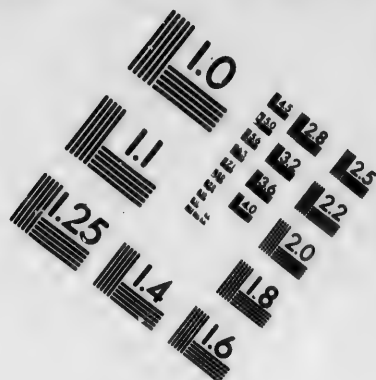
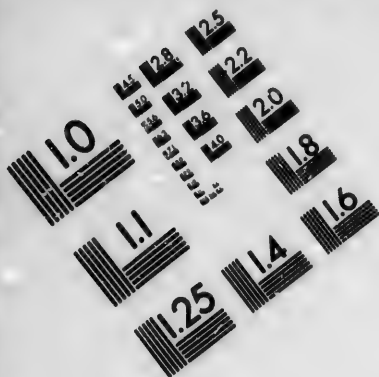
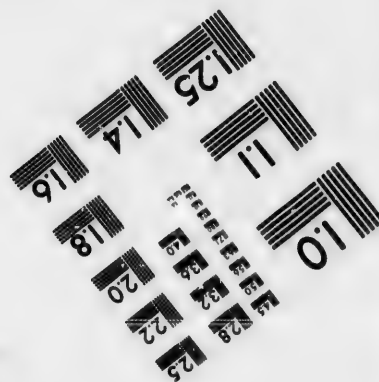
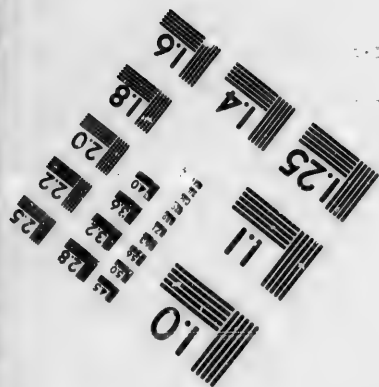
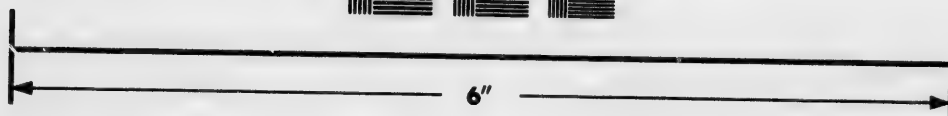
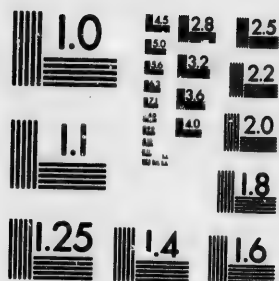


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240 EVIDENCE, &c.—APPOINTMENT OF GUARDIANS TO INFANTS.
[ORDERS 17TH SEPTEMBER, 1856, AND 8TH NOVEMBER, 1856.]

WEDNESDAY, 17TH SEPTEMBER, 1856.

Evidence may be taken before examiner where no Deputy-master.

Witnesses and parties may be examined before any examiner of this court in those counties in which there may be no deputy-master, until the appointment of a deputy-master in any such county. (2)

(2) This Order is superseded by those subsequently promulgated, and particularly by Orders of the 10th day of January, 1863, for which see *infra*, which Orders provide (Order II.) that no evidence is to be used on the hearing of a cause which has been taken before any examiner or officer of the court, unless by the order first had of the court or a judge thereof, upon special grounds adduced for that purpose. And indeed since the Orders of February, 1868, and the practice of going circuit has been adopted, the court has refused to act upon this Order of September, 1856, and that, too, even if all parties consented. (Phelan v. Phelan, 6 Grant's Ch. R. 384.)

SATURDAY, 8TH NOVEMBER, 1856.

Appointment of guardians to infants, &c., after decree.

When infants or persons of unsound mind, not so found by inquisition, are made parties to suits after decree, or are served with a notice of motion under order XIII. of the General Orders of June, 1853, guardians *ad litem* are to be appointed for them in like manner as they are now appointed at any time after bill filed; and this order is to take effect from the date hereof as to all suits as well those now pending as those hereafter to be instituted. (a)

(a) See notes to Order XIII., of the Orders of 1853, p. 71 *et seq.*, and notes to Order XXXVIII., sec. 2, p. 175, *supra*. The Court of Chancery, in its ordinary jurisdiction, can entertain applications relating to the property under its control, of persons of unsound mind, not found lunatic by inquisition. (Macfarlane, *In re*, 8 Jur. N. S. 208; 31 L. J. Ch. 385; 10 W. R. 369; 6 L. T. N. S. 154.) As to property of a lunatic, and disposition thereof, see Scammell v. Light, 8 Jur. N. S. 1122; 11 W. R. 83; 7 L. T. N. S. 414; Leeming, *In re*, 3 DeG. F. & J. 43; Wheeler, *In re*, 8 Jur. N. S. 785; 6 L. T. N. S. 846; Trevelyen, *In re*, 31 L. J. Ch. 560; 10 W. R. 828. Where one of three partners became lunatic, the court ordered the partnership property to be sold as a going concern, with liberty to all parties to bid. (Rowlands v. Evans, Williams v. Rowlands, 8 Jur. N. S. 88; 31 L. J. Ch. 265; 19 W. R.

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SERVICE OF BILL ON CORPORATIONS.
[ORDER 17TH MARCH, 1857.]

186.) And where by the lunacy of a vendor a decree in a suit for specific performance is necessary as ground for a vesting order, no costs will be given on either side. (*Cresswell v. Haines*, 8 Jur. N. S. 208; 81 L. J. Ch. 237.)

THURSDAY, 17TH MARCH, 1857.

1. When service of a bill of complaint has been made within the jurisdiction of the court, upon a corporation aggregate, by personal service thereof on the mayor, warden, reeve, president, or other head officer, or on the township, town, city, or county clerk, cashier, manager, treasurer, or secretary of such corporation, or of any branch or agency thereof in Upper Canada, or other person discharging the like duties, and when no answer has been filed to such bill within twenty-eight days from the service thereof, the plaintiff may, after the expiration of twenty-eight days from the service of such bill, apply to the court, *ex parte*, for an order to take the bill *pro confesso*, and the court upon being satisfied of the due and proper service of such bill of complaint, and that no answer has been filed thereto by such corporation, may, if it think fit, order that the bill be taken *pro confesso* against such corporation.

Service of bill on corporation aggregate in U. C., and order to take same *pro confesso*.

2. In cases where a foreign corporation aggregate, defendant to a bill of complaint, has no branch or agency in Upper Canada, then upon application to the court, supported by such evidence as may satisfy the court, in what place or country such corporation is situated, the court may order that an office copy of the bill may be served on such corporation in such place or country, or within such limits, and by personal or other service on such officer of such corporation, as the court may think fit to direct. Such order is to limit a time (depending on the place of service) within which such de-

Same as to foreign corporations having no agency, &c., in U. C.

EXAMINATION BEFORE DEPUTY MASTER.

[ORDER 6TH APRIL, 1857.]

defendant is to answer or demur to the bill, or obtain from the court further time to make defence to the bill, and where such corporation has neglected to answer or demur to such bill within the time limited by the order authorising such service, the plaintiff may apply to the court *ex parte* for an order to take the bill *pro confesso* against such corporation, and the court being satisfied of the due service of the said bill according to the exigency of such order, and that no answer has been filed for such corporation, may, if it think fit, order the same accordingly.

Order P. C.
need not be
served.

3. Such order to take the bill *pro confesso* does not require to be served, and all further proceedings may be *ex parte* against such defendant unless the court order otherwise.

Order applies to
all suits.

4. This order is to apply as well to all suits and matters now depending in this court, as to those hereafter to be commenced. (b)

(b) See notes to Order IX., sec. 4, of the Orders of 1853, pp. 30 *et seq.*, *supra*.

MONDAY, 6TH APRIL, 1857.

Whereas it is absolutely necessary for the proper despatch of business in the court, that the change hereinafter provided be made in the practice as regards the examination of witnesses and parties; it is therefore ordered that all examinations, out of examination term, of parties or witnesses, whether in a suit or in any matter or otherwise, be taken until further order before a deputy-master, or before a special examiner appointed for that purpose, unless the court or a judge thereof in

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chambers shall otherwise order upon application to be made for that purpose, which may be *ex parte*, but must be supported by affidavits setting forth the special grounds on which it is made. (c)

(c) See note to Order of the 17th of September, 1856, *supra*.

Since the practice of making circuits, one of the chief objects of which was that all evidence might be taken before one of the judges, has been adopted, the court has refused to direct the examination of witnesses to take place before an examiner in a county where no resident master has been appointed, though consented to by the parties, notwithstanding this Order and the Order of the 17th of September, 1856. (*Phelan v. Phelan*, 6 Grant, 384.)

WEDNESDAY, 23RD DECEMBER, 1857.

I. The judges of the Court of Chancery, in pursuance and in execution of all the powers enabling them in that behalf, do hereby order and direct that the rules, orders, and directions hereinafter set forth, shall henceforth be, and for all purposes be deemed and taken to be General Orders and Rules of the Court of Chancery, viz. :

II. The orders numbered XXIII. and XXV. of the Orders promulgated on the 3rd day of June, 1853, are hereby abrogated and discharged.

EXAMINATION OF WITNESSES. (d)

The plaintiff is to select the place at which the witnesses in the cause are to be examined, which may be any one of the places at which examinations are held, as hereinafter provided. The place selected is to be designated in the margin of the bill of complaint; and the witnesses of all parties are to be examined at the place so designated before one of the judges of this court unless otherwise ordered.

Notice for examination of witnesses to be stated in the margin in the bill of complaint.

(d) See notes to Order XX. of the Orders of 1853, pp. 98-114, and notes to Order XL., sec. 7, pp. 180-182, *supra*.

EXAMINATION OF WITNESSES.

[ORDER II. 23RD DECEMBER, 1857, SEC. I. AND II.]

Where a witness who had given evidence at law in an action between substantially the same parties as those in equity was afterwards committed to the penitentiary and refused to give evidence in equity, the court ordered his evidence given at *nisi prius* to be read from the judge's notes. (Switzer v. Boulton, 2 Grant, 698.)

Where the plaintiff sets down his cause for examination, and when it is called on is not prepared to go on, the defendant may have the cause struck out with costs of the day. (Cobourg and Peterboro' Railway Co. v. Covert, 7 Grant, 411; overruling Wallace v. McKay, Grant's Cham. 67.)

And where a cause is set down by the plaintiff for examination and hearing under the Orders of January, 1863, and the plaintiff is not prepared when the case is peremptorily called on, the defendant may either have the cause struck out with costs of the day, as in the above case, or he may have the plaintiff's bill dismissed out of court with costs. (See sec. 8, of Order III., of these Orders *infra*.)

Where the examination of a witness is closed and it is necessary that he should produce certain books, &c., at the hearing, the court may require him to do so by a subpoena *duces tecum*. (Vorley v. Jerram, 5 U. C. L. J. 71.)

Examinations de bene esse.—Examinations of this kind are allowed where an important witness is about to go out of the jurisdiction; (M'Intosh v. G. W. R. Co. 1 Hare, 328; Botts v. Verelst, 2 Dick. 454; but see E. I. Co. v. Naish, Bunb. 320;) or there is danger of losing his evidence from old age; (say 70 years or more;) (Rowe v. —, 18 Ves. 261;) or dangerous illness; (Bellamy v. Jones, 8 Ves. 31;) or where he is the only witness to an important fact; (Shelley v. —, 13 Ves. 56; Brydges v. Hatch, 1 Cox, 423; Shirley v. Earl Ferrers, 3 P. W. 77; Pearson v. Ward, 2 Dick. 648;) and see E. Chalmoudely v. E. of Oxford, 4 Bro. C. C. 157; where two persons were allowed to be examined *de bene esse*, they being the only ones who knew material facts. But see Anon, 19 Ves. 321.

Where the ground of the application is that the person is the only one who knows the fact, the affidavit should state the particular points to which the proposed evidence is to apply, and that the proposed witness is the only person who knows the facts, and also the grounds for believing that he is the only one. (Rowe v. —, 13 Ves. 261; Hope v. Hope, 3 Beav. 317; Pearson v. Ward, 2 Dick. 648; 1 Cox, 177.)

The order will be granted at the instance of the plaintiff in a proper case, immediately after bill filed; (Dew v. Clarke, 1 S. & S. 108;) but not at the instance of a defendant till he has answered. (Williams v. Williams 1 Dick. 92.)

Where the ground of the application is that the witness is dangerously ill or above 70 years of age, the order will be granted *ex parte*, in other cases notice of motion should be served. (Bellamy v. Jones, *supra*; Tomkins v. Harrison, 6 Mad. 315; Hope v. Hope, 3 Beav. 317.)

In this province the order will be granted where the practice requires it, though generally only where the proposed evidence is to be used for a definite purpose. (Whitehead v. Buffalo, 5 U. C. L. J. 282.)

Notice of the place and time of examination should be duly served on all parties so that they may cross-examine. (Loveden v. Milford, 4 Bro. C. C. 540.)

SEC. 2.—Any party to the suit may apply to the court, upon notice to all parties, to change the venue, and thereupon the court is to make such order as to the

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EXAMINATION OF WITNESSES.

[ORDER II. 23RD DECEMBER, 1857, SEC. I II., IV., AND V.]

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taking of the evidence in the cause as the circumstances of the case may require; and such order is to be upon such terms and conditions, as to costs or otherwise, as the court may think right to impose.

Terms and places for taking evidence in equity suits.

SEC. 3.—Witnesses resident out of the jurisdiction may be examined, as heretofore, upon commission. (e)

(e) The party desirous of obtaining a commission for the examination of witnesses out of the jurisdiction applies to a judge in chambers on notice for an order for that purpose. His application must be supported by an affidavit which should set out the names and addresses of the witnesses proposed to be examined, that they are material and necessary, and that they are required to prove certain facts, and that the application is *bonâ fide* and not for the purpose of delay. If the opposite party elects to join in the commission he is at liberty to do so. On the order for the commission having been obtained, the party applying for the commission should give to the other two days' notice in writing calling upon him to name commissioners. Each party is entitled to name four commissioners, and on the return of the appointment the names are struck before the registrar. The parties usually, to save expense, agree among themselves upon two persons to act as commissioners. When the commissioners' names are struck or agreed upon they are inserted in the commission, which is prepared by the registrar. When a commission to examine witnesses has been executed and returned into court, an order *ex parte* will be granted for opening the commission and publication of the evidence, notice to the opposite party being required of the time when the commission is to be opened. (Neale v. Withrow, 4 U. C. L. J. 88.) The rules of practice which allow evidence to be taken under a commission are not to be extended where the object is to procure mere scientific testimony—that is to say, the testimony of *experts*. (Russell v. Great Western R. Co., 3 U. C. L. J. 116.)

Witnesses examined under commission are usually examined by means of written interrogatories. Order XXI. of the Orders of June, 1853, which is the same as Order LIII. of the Orders of May, 1850, being held not to apply to foreign commissions. (Anon., 2 Grant 122.)

SEC. 4.—The following terms are fixed for the examination of witnesses at the undermentioned places, viz.: (f)

(f) The terms for the examination of witnesses fixed by this Order were subject to frequent alteration to suit the convenience of the court, and the judges have now arranged to adopt the practice followed by the common law judges in arranging their circuits in the spring and fall. And hereafter the court will promulgate an order previous to the spring and fall circuits, appointing the places and the times where and when examinations and hearings are to be held. The several places being divided into "the Home," "the Eastern," and "the Western" circuits.

SEC. 5.—No rules to produce witnesses or pass publi-

EXAMINATION OF WITNESSES.

[ORDER II. 28TH DECEMBER, 1857, SEC. V.]

No rules to produce witnesses or pass publication. Publication to pass as provided herein.

ation are to be taken out. When issue has been joined in a cause three weeks before the commencement of the next ensuing examination term, at the place where the venue has been laid, publication is to pass at the close of such term; and when issue has been joined less than three weeks before the commencement of the next ensuing examination term, at the place where the venue has been laid, publication is to pass at the close of the following term. (g)

(g) If the replication be filed in time to allow a cause to be set down for examination at the next term, but it is not set down, publication does not pass till the close of the term following the one for which it might have been set down.

If, however, a cause has been set down for examination, publication passes at the close of the ensuing term, though issue has been joined less than three weeks before it commences; (Wallade v. McKay, Grant's Cham. 67;) and see sec. 10 of this Order, which provides that "the witnesses of all parties are to be examined during the term for which the cause has been set down."

The court will, however, in a proper case, grant an order enlarging the time for publication; (Moody v. Leeming, 1 Mad. 85; Barnes v. Abram, 3 Mad. 103; in the latter case publication was enlarged several times;) or in special cases will open publication after it has passed. Applications to open publication are, however, not encouraged; (Mallock v. Pinhey, Grant's Cham. 105; 8 U. C. L. J. 190;) and will not be granted if the proposed evidence could have been obtained in due course, with reasonable diligence; (Waters v. Shade, 2 Grant 218;) and suits for alimony are not excepted from this rule. (McKay v. McKay, 6 Grant, 279.)

The court refused to open publication at the instance of a defendant to obtain evidence of an alleged conversation between a person named in the bill and a co-defendant, on the ground that the attention of the defendant having been called to the person by the bill, it was negligence not to have made enquiries of such person; and it also appearing that the evidence if let in would not be conclusive. (Mallock v. Pinhey, *supra*.)

If, however, there has been no negligence on the part of the applicant, and it would be conducive to justice, publication will be opened, and if necessary a commission will be issued to examine witnesses out of the jurisdiction. (Blain v. Terryberry, Grant's Cham. 105.) The terms on which the application was granted, were payment of the costs of the application, and of a counsel attending the examination of the proposed witnesses, and upon other terms insuring due diligence in the examination. (*Ibid*.)

Where publication had closed, and nothing had been done by either party for six years, it was opened on the application of the plaintiff. (Chambers v. Chambers, 4 U. C. L. J. 232.) Where the defendant had examined his witnesses, but the plaintiff had not, and there was a short delay on his part on account of poverty, the court granted an application by the plaintiff to open publication. (Taylor v. Shoff, 3 Grant, 153.)

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Where the defendant's solicitor omitted to ask a witness what had become of a deed mentioned in his evidence, whereby the defendants were precluded from giving secondary evidence of its contents, leave was given to exhibit an interrogatory to prove where the deed was, after the cause had been set down for hearing. (*Covert v. Bank U. C.*, 1 Grant, 566.)

Where, however, any party to the suit obtains an order to open publication, the other parties may examine at large, unless the order opening publication be restrictive, it being a rule that when publication is opened for one, it is opened for all. (*Anon.*, 1 Vern. 253.)

On an application to open publication by one defendant, the other defendants must be served with notice. (*Brydges v. Branfill*, 10 L. J. Ch. 14.)

As to enlarging publication generally, see *Whitelock v. Baker*, 13 Ves. 512; *Yate v. Bolland*, 1 Dick, 495; *Cook v. Broomhead*, 16 Ves. 183; *Conethard v. Hasted*, 3 Mad. 429; *Anon.*, 1 L. J. Ch. 119; *Long v. Barne*, (*Ibid.*); *Harrison v. Corbould*, 7 L. J. Ch. 162; *Barraud v. Archer*, 1 W. R., 109. The application must be made in chambers.

SEC. 6.—At any time after the issue joined, the case may be set down for the examination of witnesses by any party to the cause who has witnesses to examine.

Any party having witnesses to examine may set down cause for examination.

SEC. 7.—The party who desires to have a cause set down for the examination of witnesses is to enter it for that purpose with the registrar, or deputy-registrar, at the place where the venue has been laid at least fourteen days before the commencement of the next ensuing examination term. (i)

Cause to be entered with the registrar or deputy registrar.

(i) See the third Order of the Orders of Court, promulgated on the 10th day of January, 1863, as follows:

"III. When the examination of witnesses before a judge is to be had in any town or place, other than that in which the pleadings in the cause are filed, it shall be the duty of the party setting down the cause for such examination, to deliver to the registrar or deputy-registrar with whom the pleadings are filed, a sufficient time before the day fixed for such examination, a præcipe requiring him to transmit to the registrar or deputy-registrar, at the place where such examination of witnesses is to be had, the pleadings in the cause; and at the same time to deposit with him a sufficient sum to cover the expense of transmitting and re-transmitting such pleadings, and thereupon it shall be the duty of such registrar or deputy-registrar forthwith to transmit the pleadings accordingly."

By the same Order it is provided as follows:

"The fee payable to the deputy-registrars for setting down causes under the foregoing order is to be two pounds."

SEC. 8.—The registrar or deputy-registrar is to prepare a list of all causes entered for examination, and each cause is to be set down in such list in the order in

Causes to be taken up accord-

[ORDER II. 23RD DECEMBER, 1867, SEC. IX. AND X.]

ing to the registra-
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which it has been entered with the registrar, and causes are to be called on according to the registrar's list.

Notice that the cause has been set down for examination to be served upon all parties; but no appointment is to be taken out or list of witnesses to be furnished.

SEC. 9.—Notice that the cause has been set down for the examination of witnesses is to be served by the party setting the same down upon all parties at least fourteen days before the commencement of the examination term during which such evidence is to be taken, which notice may be in the form set forth in schedule A. to these orders annexed, but no appointment is to be taken out, and no list of witnesses furnished.

The witnesses of all parties are to be examined at the time or place appointed unless the examination has been postponed, or further time allowed.

SEC. 10.—The witnesses of all parties are to be examined during the term for which the cause has been set down, unless the court shall have seen fit, upon a previous application, to postpone such examination; or unless the judge before whom the evidence is to be taken shall see fit to postpone such examination, or to allow time for the production of further evidence; and when such examination is postponed in the manner aforesaid, or when time is allowed for the production of further evidence, the order is to be upon such terms, as to costs or otherwise, as the court, or a judge, may think it right to impose. (h)

(h) See Orders promulgated on 28th April, 1862, which provide for the examination of parties to suits without order:—

“EXAMINATION OF PARTIES TO SUITS.

Any party defendant may be examined as a witness without order, on behalf either of the plaintiff or of a co-defendant. And any party plaintiff may be examined as a witness without order, by a co-plaintiff, or by a defendant, in cases where under the present practice such examination may be had upon the common order being obtained for that purpose.”

The attendance of witnesses can be compelled by subpoena. If a witness is resident in Lower Canada, an application may be made *ex parte* to a judge in chambers for an order that a subpoena may issue commanding such person to attend. The application must be supported by an affidavit which must negative the fact that any action is pending for the same cause of action in Lower Canada. It must state the name

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EXAMINATION OF WITNESSES.

[ORDER II., 23RD DECEMBER, 1857, SEC. XI., XII., XIII., AND XIV.]

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of the witness, and that he is resident in Lower Canada, and where—and that he is a material and necessary witness. On obtaining the order, the registrar issues the subpoena. A copy of the order should be served on the witness as well as the subpoena, and the originals produced to him. The power of issuing such a subpoena is given to the court by Con. Stats. of Canada, ch. LXXIX., secs. 4, 5, 6 & 7, pp. 890, 891. The witness may be punished for disobedience to the subpoena, see sec. 8. But his expenses must be paid or tendered, see sec. 9. The statute 14 & 15 Vic., ch 86, does not authorise parties being received as witnesses on their own behalf. (Fuller v. Richmond, 2 Grant, 509.)

To admit the evidence of a particular witness as to a particular fact after the general evidence is closed, is always looked upon as very objectionable and open to abuse, on the ground that such witness has had an opportunity of seeing what evidence has been given by the others, and the opposite party no opportunity of having the previous evidence taken out of the presence of the proposed witness. (Peterborough v. Conger, Grant's Cham. 37.)

SEC. 11.—Where differences arise as to the conduct of the examination, the judge before whom the evidence is being taken, is to prescribe the order in which the several parties are to adduce their witnesses, or to give such directions as to the general conduct of the examination as the circumstances of the case may require; and the evidence of any person who declines to produce his witnesses when called upon is to be altogether excluded, unless the judge shall order otherwise.

SEC. 12.—Any witness may be recalled for further examination, as in trials at *nisi prius*, without any order of the court having been obtained for that purpose.

SEC. 13.—Articles are not to be filed in future for the purpose of discrediting a witness: but witnesses may be called for that purpose, without the leave of the court; and they are to be examined at the time and place fixed for the examination of the other witnesses in the cause, unless the judge before whom the evidence is being taken shall otherwise order.

SEC. 14.—Depositions are to be taken and expressed in the first person of the deponent. (i)

(i) Imp. Stat., 3 & 4 Wm. 4, ch. XCIV., sec. 27, and 107th Order of May, 1845, Eng.

[ORDER II., SEC. XV. AND XVI., AND ORDER III. OF 23RD DECEMBER, 1857, SEC. I-V.]

Orders. The witness must sign the depositions, and it has been held that if the witness omits to sign, and afterwards dies, the depositions cannot be used. (*Copeland v. Stanton*, 1 P. W. 414.)

Each party to be at liberty to use the depositions of any witness adduced by any other party.

SEC. 15.—Any person is to be at liberty to make use of the depositions of any witness adduced by any other party to the suit, subject, however, to such terms, if any, as to the costs of taking such evidence, as the court may think it right to impose. (*k*)

(*k*) See Order promulgated on the 28th April, 1862, as follows:—

“READING DEPOSITIONS IN OTHER CAUSES.

Any party shall be entitled in future upon notice without order to use depositions taken in another suit in cases where under the present practice he is entitled to use such depositions upon obtaining the common order for that purpose.”

Court may require production of witnesses, &c.

SEC. 16.—The court, if it see fit, may require the production and oral examination before itself of any witness or party in any cause, matter, or proceeding, and is to direct the costs of and attending the production and examination of such witness or party to be paid by such of the parties to the suit, or in such manner as it may think fit.

SETTING DOWN THE CAUSE.—HEARING, &c.

Causes to be heard during term only.

III.—(l)—[Abrogated and discharged by order of court dated the 28th day of April, 1862.]

Hearing term.

SEC. 2.—(l)—[Abrogated and discharged by order of court dated the 28th day of April, 1862.]

Causes to be entered with the Registrar.

SEC. 3.—(l)—[Abrogated and discharged by order of court dated the 28th of April, 1862.]

Registrar to prepare a list, according to which causes to be called on.

SEC. 4.—(l)—[Abrogated and discharged by order of court dated the 28th day of April, 1862.]

Notice of hearing to be served.

SEC. 5.—(l)—[Abrogated and discharged by order of court dated the 28th day of April, 1862.]

(*l*) Sections 1, 2, 3, 4, 5, of this Order are abrogated and discharged by the Orders of court promulgated on the 28th day of April, 1862. These Orders are as follow:—

HEARINGS.

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[ORDER III., 23RD DECEMBER, 1867, SEC. I-V.]

MONDAY, 28TH APRIL, 1862.—SITTINGS OF COURT.

Sections 1, 2, 3, 4, and 5, of Order number three of the General Orders of 23rd of December, 1867, are hereby abrogated and discharged.

The judges of the court will sit separately and by alternate weeks, as follows:

One judge will sit daily in each week for the despatch of all business other than re-hearings and chamber business.

The business before such judge will be taken as follows:

Monday.—Motions.

Tuesday, } —Hearings *pro confesso*; motions for decree; further direc-
Wednesday. } tions; appeals from master's reports.

Thursday, } —Hearings of causes; demurrers, (excepting during the re-
Friday, } hearing term.)
Saturday. }

SETTING DOWN CAUSES.

The party who desires to have a cause set down to be heard, is to enter it with the registrar for that purpose, at least fourteen days before the day for which the same is set down.

LISTS TO BE PREPARED BY THE REGISTRAR.

The Registrar is to prepare lists of all causes entered for hearing, making a separate list of all the causes to be heard before each judge. Each cause is to be set down in the order in which it has been entered with the Registrar. Causes are to be called on and heard according to the Registrar's list, unless the court order otherwise.

NOTICE OF HEARING.

Notice of hearing must be served by the party setting down the cause, upon all proper parties, for a proper day falling within the week in which the judge in whose list the same is set down is to sit, and such notice is to be served not less than twelve days before the day for which such notice is given."

See also Orders promulgated on the 9th day of May, 1862, as to "Hearings":

"The Registrar is to prepare a peremptory list of causes set down for hearing for each day on which they are to be heard, and for that purpose the party setting down a cause for hearing is to notify the Registrar of the day for which he has given notice of the hearing of such cause not less than seven days before the day for which such notice is given."

And the second order of the Orders of the 10th day of January, 1863, which regulates the present practice as to "Hearings." The cause is now heard immediately after the examination of witnesses. The Order is as follows:

[ORDER III., 23RD DECEMBER, 1857, SEC. VI. VII. AND VIII.]

"HEARINGS.

II. Causes are to be heard at the same time that the witnesses are examined upon the close of such examination. No evidence to be used on the hearing of a cause is to be taken before any examiner or officer of the court, unless by the order first had of the court or a judge thereof, upon special grounds adduced for that purpose."

Where a plaintiff, after replication, set the cause down for hearing, (without having set it down for examination,) and on the cause coming on, declined to treat it as having been set down on bill and answer, the court ordered it to be struck out of the list. (Killaly v. Graham, 2 Grant, 281.)

Where an objection exists to the setting down a cause, the opposite party must take the objection before the cause comes on for hearing, or he will be deemed to have waived it, unless he could not with reasonable diligence have taken it earlier. (*Ibid.*)

Where a cause is *pro confesso* against one defendant, and others have answered, it must be heard against all at the same time. (Fuller v. Richmond, 2 Grant, 24.)

The court will not, since the Orders of 10th January, 1863, at the hearing of the cause, allow evidence by affidavit under sec. 4 of Order XX. of the Orders of June, 1853, unless by consent.

If plaintiff neglects to set down cause defendant may do so.

SEC. 6.—If the plaintiff neglects to set down the cause to be heard within one month after publication has passed, any defendant may cause the same to be set down, and may serve notice of hearing on the parties to the cause. (*m*)

(*m*) The defendant cannot set the cause down for hearing before publication has passed; (Ellis v. King, 4 Mad. 126; Langley v. Fisher, 5 Beav. 589;) nor before the expiration of the month mentioned in this section, and accordingly where a defendant set a cause down to be heard one day before the expiration of the month, it was ordered to be struck out of the list with costs, notwithstanding that by the delay of the plaintiff in moving, the defendant was unable to set the case down for the ensuing hearing term; (Toronto v. McGill, Grant's Cham. 16;) *sed quere*, since the Orders of January, 1863; see sec. 6 of Order II. of Orders of 23 December, 1857.

Defendant making default at hearing, the decree to be absolute in first instance.

SEC. 7.—Where a defendant makes default at the hearing of a cause, the court is to make such decree as it may think fit; this decree is to be absolute in the first instance, without giving the defendant a day to shew cause, and such decree is to have the same force and effect as if the same had been a decree *nisi* in the first instance, and had been afterwards made absolute in default of cause shewn by the defendant.

SEC. 8.—If the plaintiff causes the bill to be dismissed,

on his own application, after it has been set down to be heard; or if the cause is called on to be heard, and the plaintiff makes default, and by reason thereof the bill is dismissed; in either case such dismissal is to be equivalent to a dismissal on the merits, unless the court order otherwise, and may be set up in bar to another suit for the same matter. (n)

If plaintiff dismiss after cause set down to be heard—effect of.

(n) After a cause has been set down for hearing, the plaintiff is not entitled to an order, as of course, to dismiss his bill with leave to file a new one. (Gardner v. Brennan, 4 Grant, 199; Smith v. Port Hope Harbour Co., 6 U. C. L. J. 189.)

SEC. 9.—The practice of excepting to bills, answers, or other proceedings for scandal or impertinence is abolished. But if upon the hearing of any cause or matter the court is of opinion that any pleading, petition, or affidavit is scandalous, the court may either order such pleading, petition, or affidavit to be taken off the file, or may direct the scandalous matter to be expunged, and is to give such direction as to costs as it may think right.

Exceptions for scandal, &c., abolished.

SEC. 10.—A motion to have any pleading, petition, or affidavit taken off the file for scandal, or to have the scandalous matter expunged, may be made at any time before the hearing of the cause or matter.

Motion to expunge, &c., scandalous pleading, &c.

SEC. 11.—If, upon the hearing of any cause or matter, the court is of opinion that any pleading, petition, or affidavit, is of unnecessary length, the court may either direct payment of a sum in gross or in lieu of taxed costs therefor, or it may direct the taxing-officer to look into such pleading, petition, or affidavit, and to distinguish what part or parts thereof is or are of unnecessary length, and to ascertain the costs occasioned to any party by any unnecessary matter; and the court is to make such

If court consider that pleading is of unnecessary length, may award costs, &c.

[ORDER 6TH FEBRUARY, 1858.]

order as it thinks just, for the payment, set-off, or other allowance of such costs, by the party, his solicitor, or counsel.

Hearing on further directions.

SEC. 12.—Causes may be set down to be heard on further directions for any court day, but notice thereof must be served at least seven days before the day for which the cause has been set down.

SCHEDULE A.

FORM OF A NOTICE OF EXAMINATION.

*In Chancery.*A. B.,.....*Plaintiff,*

and

C. D.,.....*Defendant.*

To the above _____

Take notice that this cause has been set down for the examination of witnesses at _____ on the _____ day of _____ at which time and place the witnesses for all parties must be examined.

E. F.

Solicitor for the plaintiff.

(Or as the case may be.)

SATURDAY, 6TH FEBRUARY, 1858.

PROCEEDINGS IN SUITS FOR FORECLOSURE OR SALE. (o)

In suits instituted by mortgagees or judgment creditors for sale or foreclosure, when all incumbrancers have not been made parties, or further enquiries are sought, the complainant is to bring into the master's office together with the decree, a certificate from the registrar of the county wherein the lands lie, setting forth all the registered incumbrances which affect the property in the

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pleadings mentioned, and such other evidence as he may be advised; and upon his *ex-parte* application for that purpose the master is to direct all such persons as appear to him to have any lien, charge, or incumbrance upon the estate in question to be made parties to the cause.

ties to the bill, are to be made parties by the master.

(o) See *supra*, pp. 129-145.

Query, has the master, notwithstanding the language of this order, any power to make parties where not directed by the decree.

On a decree for sale, all incumbrancers, whether prior or subsequent to the plaintiff, must be made parties in the master's office, unless the plaintiff wishes to sell, subject to prior mortgages, which is the usual form in which decrees for sale are now drawn up. (*White v. Beasley*, 2 Grant, 660.)

An incumbrancer in the Master's office has no right to impugn a prior judgment, on the ground that it was irregularly obtained at law. (*Hamilton v. Thornhill*, 8 U. C. L. J. 78.)

When the bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause. But when the plaintiff in any such cause prays a sale or foreclosure, subject to a prior mortgage, such mortgagee is not to be made a party either originally or in the master's office.

Bill by subsequent incumbrancer—when prior mortgagee must be a party, when not.

Upon the office copy of the decree to be served upon persons made parties in the master's office, under the provisions of this order, there must be endorsed a notice to the effect set forth in schedule A. to these orders annexed.

Notice to be given to persons made parties in master's office.

When a reference has been directed as to incumbrances, or to settle priorities, in any case provided for by this order, the master, before he proceeds to hear and determine, is to require an appointment to the effect set forth in schedule B. to this order annexed, to be served upon

And to persons parties to the cause before the hearing.

[ORDER 6TH FEBRUARY, 1868.]

all persons made parties before the hearing, whether the bill has been taken *pro confesso* against such persons or not.

Effect of parties neglecting to attend before master.

When any person who has been duly served with an office copy of the decree, or with an appointment under the provisions of this order, neglects to attend at the time appointed, the master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the court order otherwise, upon application duly made for that purpose.

Report to state names of persons made parties in his office, and also to settle priorities, &c.

The master's report in the cases specified in this order, must state the names of all persons who have been made parties in his office, and of those who have been served with the appointment hereinbefore provided. The names of such as have made default, having been duly served, must then be stated; and then the report must go on to settle the priorities, &c., of such as have attended, and these latter are to be certified as the only incumbrancers upon the estate.

Mortgagee proceeding at law not have costs in equity.

Where a mortgagee has proceeded at law upon his security, he shall not be entitled to his costs in equity, unless the court, under the circumstances, shall see fit to order otherwise.

MASTER'S AND DEPUTY REGISTRARS.

Fees to deputy registrar.

The masters and deputy-registrars appointed by this court, shall, in addition to the fees already payable to them, be entitled to receive upon the setting down of causes for the examination of witnesses, the sum of one pound ten shillings for each case to be set down. (p)

(p) By Order of court, promulgated on the 10th day of January, 1868, it is pro-

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FORECLOSURE OR SALE.—NOTICE "A."
[ORDER 6TH FEBRUARY, 1858.]

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vided that the fee payable to deputy registrars, for setting down causes, is to be two pounds.

SCHEDULE A.

Whereas a suit has been instituted by the within named complainant for the foreclosure (or as the case may be) of certain lands, being the west half of lot No. 19, in the second concession of the township of Toronto, (or some other sufficient description of the property,) (a) and I have been directed to enquire whether any person other than the plaintiff, has any charge, lien, or incumbrance upon the said estate; and whereas it has been made to appear before me that you have some lien, charge or incumbrance upon the said estate, and I have therefore caused you to be made a party to this suit, and appointed the _____ day of _____

for you to appear before me, either in person or by your solicitor, to prove your claims.

Now, You are hereby required to take notice:

1st. That if you wish to apply to discharge my order making you a party, or to add to or vary the within decree, you must do so within fourteen days from the service hereof; and if you fail to do so, you will be bound by the decree and the further proceedings in this cause as if you were originally made a party to the suit.

2nd. That if you fail to attend at my chambers at Osgoode Hall, in the city of Toronto, (or as the case may be,) at the time appointed, you will be treated as disclaiming all interest in the property in question, and it will be disposed of in the same way as if you had no claim thereon, and your claim will be in fact foreclosed by such non-attendance.

A. B., Master.

NOTE (a)—When the decree is for the sale of the debtor's lands generally at the

FORECLOSURE OR SALE.—APPOINTMENT "B."

[ORDER 30TH JUNE, 1858, AND ORDER 13TH APRIL, 1859.]

suit of a judgment creditor, say for the sale of all the lands of *(the debtor)* within the county of York (or as the case may be.)

SCHEDULE B.

In Chancery.

A. B.,

and

C. D.,

plaintiff,

defendant.

Having been directed by the decree in this cause to enquire whether any person other than the plaintiff has any lien, charge or incumbrance upon the lands in the pleadings mentioned, being the west half of lot 10, in the 2nd concession of the township of York, (or some other plain description,) I do hereby appoint the day of _____ at my Chambers at Osgoode Hall, in the city of Toronto, (or as the case may be,) to proceed with the said enquiries. And you are hereby required to take notice that if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

E. F., Master.

WEDNESDAY, 30TH JUNE, 1858.

It is ordered that the time of the long vacation is not to be reckoned in the computation of the time appointed or allowed for the purpose of answering either an original or amended bill. (g)

(g) See Order V. of the Orders of 1853, pp. 3, and 4, *supra*.

WEDNESDAY, 13TH APRIL, 1859.

The judges of the Court of Chancery, under and in pursuance of the powers vested in them under the statute in that behalf, do hereby order and declare:

HEARING.—SOLICITOR.—ENTRY OF EXHIBITS,
[ORDER I., II., AND III., 13TH APRIL, 1859.]

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I. That from and after the first day of July next, the fee payable to, and to be received by the registrar of this court, on the setting down of each cause, other than those ordered to be taken *pro confesso*, shall be the sum of ten shillings.

Fee of 10s. to be paid to registrar on setting down each cause, other than those taken *pro confesso*.

II. The judges of this court, taking notice of the inconvenience and expense occasioned to the suitors in the court, by reason of the non-attendance of the solicitors of the parties or some of them at the times when such causes are called on to be heard, or during the hearing thereof, by reason of which non-attendance such causes are struck out of the paper, and cannot be restored without an expense which ought not to be sustained by the parties; or the hearing thereof is unnecessarily postponed, not only to the inconvenience of the parties to such causes, but also to the inconvenience of parties in other causes; do think proper hereby to order, in conformity with what the rules and practice of the court already require, that the solicitors for the several parties in all causes do attend in court when such causes are appointed to be heard, and during the hearing thereof. And that whenever, upon the hearing of any cause, it shall appear that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally or by some person in his behalf, or having omitted to deliver any paper necessary for the use of the court, and which, according to its practice, ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court shall think fit to award.

Solicitor to attend at hearing of cause, or in default of attendance to pay costs.

III. In future the evidence read by each side must be stated distinctly by counsel, in order that the same may be entered by the registrar before the case is closed, in accordance with the order to that effect.

Evidence used at hearing to be entered.

SHERIFFS' AND CORONERS' FEES.

[ORDER 30TH APRIL, 1859.]

Exhibits to be
left with regi-
strar, who shall
give receipt
therefor.

When judgment is reserved, the exhibits used upon the hearing must be deposited with the registrar for the use of the court. All exhibits deposited under this order must be described in a schedule, to be prepared by the party depositing the same. The schedule shall be in duplicate, one copy of which, signed by the registrar, shall be handed to the party depositing the exhibits, and the other retained for the use of the court.

When this order has not been complied with, the case will not be considered as standing for judgment.

Bill, answer, and
affidavit, to be
divided into pa-
ragraphs and
numbered.

IV. From and after the first day of July next, every bill and answer filed; and every affidavit to be used in any cause or matter, shall be written in a plain legible hand, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any bill, answer or affidavit, or part of any bill, answer or affidavit, substantially violating this order; nor shall any affidavit violating this order be used in support of, or opposition to, any motion, without the express permission of the court.

SATURDAY, 30TH APRIL, 1859.

Fees to sheriffs
and coroners.

The judges, in pursuance of the authority vested in them under and by virtue of the statute in that behalf, do hereby order and direct that the sheriffs and coroners, in their several counties, shall be entitled to receive and take for the several services hereinafter mentioned, the sums specified for the same, and no other or greater fees or allowance:

RECEIVING, filing, entering, and endorsing
every paper..... £0 1 3

SHERIFFS' AND CORONERS' FEES.
[ORDER 30TH APRIL, 1850.]

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RETURN of all Process and Writs except		
Subpœnas.....	0	2 6
WARRANT to Bailiff on Writ not executed		
by Sheriff or Deputy.....	0	2 6
SERVING each Office Copy Bill, including		
affidavit of service.....	0	5 0
SERVING each Warrant, Notice, Certificate,		
Subpœna, or other paper.....	0	2 6
NE EXEAT—Arrest on, when amount en-		
dorsed under £50.....	0	5 0
£50, and under £100.....	0	10 0
£100 and over.....	1	0 0
ATTACHMENT—not defined, arrest on.....		
Arrest upon attachment in the nature		
of an execution, when the sum endorsed		
is under £50.....	0	5 0
Over £50, and under £100.....	0	10 0
£100 or over.....	1	0 0
Besides Poundage for sums endorsed		
when sum endorsed is under £100....	5	per cent.
Exceeds £100, but is less than £1000,		
5 per cent. for the first £100, and 2½		
per cent. for the residue. £1000 and		
over, 1½ per cent. on whatever exceeds		
£1000, in addition to the poundage		
allowed up to £1000		
SEQUESTRATION—upon seizure of estate		
and effects under Writ of Sequestra-		
tion.....	0	10 0
Schedule of goods taken in execution, in-		
cluding copy for defendant, if not ex-		
ceeding 5 folios.....	0	5 0
Each folio above 5.....	0	0 5
Removing or retaining property, rea-		

RETURNS BY THE DEPUTY REGISTRARS.

[ORDER 5TH OCTOBER, 1859.]

sonable and necessary disbursements, and allowances to be made by the Master, or by order of the Court or Judge.

Poundage upon sequestration, followed by sale.

Where amount made under £100, at...5 per cent. £100, but under £1000, 5 per cent. for the first £100, 2½ per cent. for the residue.

£1000, and over, 1½ per cent. on whatever exceeds £1000, in addition to the poundage allowed up to £1000, in lieu of all fees and charges for services and disbursements, except mileage in going to seize, and disbursements for advertising, and except disbursements necessarily incurred in the care and removal of property, to be allowed by the Master in his discretion.

FOR SERVICES NOT SPECIFIED—The like charges as are allowed at common law for analogous services.

WEDNESDAY, 5TH OCTOBER, 1859.

D'y. registrars
to certify O. O.
decree.

Ordered, that all office copies of decrees to be served on parties, added in the master's office, may be certified by the deputy-registrar where the reference is made to.

And transmit
quarterly re-
turns of bills
filed to registrar.

Ordered, that the deputy-registrars do transmit to the registrar of this court, at Toronto, on the first day of January, April, July, and October, in each year, a list of all bills filed with them respectively during the preceding quarter of the year.

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(s) See

29TH JUNE, 1861.

PRO CONFESSO—SETTING DOWN. (r)

Where a bill has been ordered to be taken *pro confesso*, the cause may thereupon be set down to be heard; but the day for which the same is so set down is to be not less than ten days from the setting down thereof, unless the court think fit to appoint a special day for the hearing thereof.

Hearing *pro confesso*: causes to be set down ten days.

(r) See *supra*, pp. 75 *et seq.*

MOTION FOR DECREE. (s)

Where a party has given notice of motion for decree, he is to set the cause down to be heard on such motion not less than ten days before the day for which such notice is given, unless he shall have obtained an order allowing a less time for such purpose.

Motion for decree.

Motions for decrees are to be allowed only in three classes of cases, namely:—

In what cases to be allowed.

First.—Where there is no evidence.

Second.—Where the evidence consists only of documents, and such affidavits as are necessary to prove their execution or identity, without the necessity of any cross-examination.

Third.—Where infants are concerned, and evidence is necessary only so far as they are concerned for the purpose of proving facts which are not disputed: but this order is not to apply to cases in which, but for this order, the court would grant leave to serve short notice of motion for decree in order to prevent irreparable injury.

(s) See *supra*, pp. 80 *et seq.*

[ORDERS 29TH JUNE, 1861.]

DELIVERY OF POSSESSION AFTER FINAL FORECLOSURE. (t)

Possession after final foreclosure.

In any suit for foreclosure or for redemption, the mortgagee or other person entitled to the equity of redemption, being in possession of the premises foreclosed, may be ordered to deliver up possession of the same upon or after final order of foreclosure, or for the dismissal of the bill, as the case may be.

(t) See *supra*, pp. 129 *et seq.*PARTIES INTERESTED IN THE EQUITY OF REDEMPTION
MADE PARTIES IN THE MASTER'S OFFICE. (u)

Parties interested in equity of redemption may be added in master's office.

In any case in which it shall appear conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the master's office, by reason of the parties so interested being numerous or otherwise, it shall be competent to the court, at the hearing, or afterwards, to direct that parties so interested may be made parties in the master's office, upon such terms as to the court shall seem fit; such order to be only made where one or more parties interested in the equity of redemption are already before the court.

(u) See *supra*, pp. 187 *et seq.*

DEFENDANT ABSCONDING, OR BEING CONCEALED. (v)

Absconding or concealed defendant may be protected against order of sale of property under General Order, 1863.

In case it appears to the court by sufficient evidence, that any defendant against whom a bill has been filed, has been within the jurisdiction of the court at some time, not more than two years before the filing of the bill, and that such defendant, after due diligence, cannot be found to be served with an office copy of the bill, and that there is good reason to believe that he has absconded from the jurisdiction, or that he is concealed within the same, the court may make such order as is prescribed by

section
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MASTER'S OFFICE; APPOINTMENTS.—TAXATION OF COSTS, &c. 265
[ORDER 29TH JUNE, 1861.]

section 7th of the 9th of the General Orders of June, 1853.

(v) See *supra*, pp. 37, 38.

APPOINTMENTS AND NOTICES IN THE MASTER'S OFFICE. (w)

Where the master shall direct that parties not in attendance before him shall be notified to attend before him at some future day, or for different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, to be signed by the master, of the proceedings to be taken, and of the times by him appointed for taking the same.

Not necessary to issue separate warrants in master's office.

In cases where parties are notified by appointment from the master, of proceedings to be taken before him, no warrants shall be issued as to such parties in relation to the same proceedings.

And no warrant necessary when notice given of same proceedings.

Parties making default upon such appointments, are to be subject to the same consequence as if warrants had been served upon them.

Parties in default subject to same consequence as if warrant served.

(w) See *supra*, pp. 187, 188.

TAXATION OF COSTS. (x)

Where costs are awarded to be paid, it shall be competent to the master in ordinary to tax the same, without any express reference to him for that purpose.

Master in ordinary to tax costs without express reference.

(x) See *supra*, pp. 218 *et seq.*

PAYMENT OF MORTGAGE MONEY. (y)

Where the master is directed to appoint mortgage money to be paid at some time and place, he is to appoint

Mortgage money to be made payable at bank to

[ORDER 29TH JUNE, 1861.]

Joint credit of
registrar and
party entitled.

the same to be paid into some bank at its head office, or at some branch or agency office of such bank, to the joint credit of the party to whom the same is made payable, and of the registrar of this court; the party to whom the same is made payable to name the bank into which he desires the same to be paid, and the master to name the place for such payment.

Or separate credit
of party.

Where money is paid into some bank, in pursuance of such appointment aforesaid, it shall be competent to the party paying in the same, to pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of such party and the registrar. If the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of this court.

Certificate of de-
fault in payment.

Where default is made in the payment of money appointed under this order to be paid into any bank, the certificate of the cashier, where the same is made payable, or of other, the like bank officer, shall be sufficient evidence of such default. Where the affidavit of the party entitled to receive the same is by the present practice required, the like affidavit shall still be necessary.

(y) See *supra*, pp. 183, 189.

CONDUCT OF SALE. (z)

Party asking sale
may have con-
duct thereof.

Where, upon a bill for foreclosure, a sale is asked for by a defendant, it shall be competent to the court to require as a condition that the party asking the same shall conduct the sale at his own expense, dispensing in such case with a deposit, if the court shall think fit.

(z) See *supra*, p. 131.

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NOTICES, APPOINTMENTS, &C., HOW TO BE SERVED. (a)

The General Order of this court, number XLIII., is altered and varied in the following particulars:

Where the pleadings in any cause have been filed in the office of the registrar of the court, at Toronto; or in the office of any deputy-registrar, all notices, appointments, warrants, and other documents and written communications in relation to matters transacted in court or chambers, or in the office of the master or registrar, which do not require personal service upon the party to be affected thereby are to be served upon the solicitor, when residing in the city of Toronto; and when the solicitor to be served resides elsewhere than in the city of Toronto, then such notices, appointments, warrants, and other documents, and written communications aforesaid, may be served either upon such solicitor, or upon his Toronto agent, named in the "Solicitors' and Agents' Book;" unless the court, or a judge thereof, or a master, before whom any such proceeding may be had shall give any direction as to the solicitor upon whom any such notice, appointment, warrant, or other document or written communication shall be served. And if any solicitor neglect to cause such entry to be made in "the Solicitors' and Agents' Book," as is required by the above general order, the leaving a copy of any such notice, appointment, warrant or other document, or written communication for the solicitor so neglecting as aforesaid, in the office of the registrar, is to be deemed sufficient service, unless the court direct otherwise.

Service of notices, appointments, &c., on solicitor or agent.

(a) See *supra*, pp. 207, 208.

AFFIDAVITS ON APPLICATIONS TO COURT. (b)

Section 3, of General Order number XL., is hereby abolished, except as to affidavits in support of *ex parte* affidavits to be used on application.

[ORDER 29TH JUNE, 1861.]

tions. No costs
of office copies.

applications; but this order is not to be taken to warrant the taxation of the costs of obtaining office copies of affidavits, for use upon the hearing of any matter, by the party on whose behalf they are filed.

When affidavits
must be filed.

Affidavits, except upon *ex parte* applications, must be filed before they can be used; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion.

(b) See *supra*, p. 178.

PROCEEDING WHERE STATE OF ACCOUNT CHANGED AFTER
DECREE OR REPORT. (c)

When state of
account changed
by receipt of
rents, &c., notice
to be given.

In cases where after a decree or decretal order for the sale or foreclosure of mortgage property the state of the account ascertained by decree or decretal order, or by the report of the master, shall be changed by payment of money, by receipt of rents and profits, by occupation rent, or otherwise, before final order for foreclosure or sale obtained, it shall be competent to the plaintiff or other party to whom the mortgage money is payable, to give notice to the party by whom the same is payable, that he gives him credit for a sum certain to be named in such notice, and that he claims that there remains due to him in respect of such mortgage money a sum certain, to be also named in such notice; and in case, upon the final order for foreclosure or sale being applied for, the judge shall think the sums named in such notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the judge shall direct notice to be given: or it shall be competent to the party to whom the mortgage money is payable, to apply to a judge in chambers for a reference to a master, or for an appointment to fix such sums respectively, and in the latter case either upon

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(d) See s

MASTER'S REPORT; APPEALS FROM.
[ORDER 29TH JUNE, 1861.]

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notice, or *ex parte*, as the judge may think fit, and the order to be made thereupon is to be served, or service thereof dispensed with, as the judge may direct. ter in discretion of judge.

It shall be competent to the party to whom such notice may be given to apply to a judge in chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid instead of the amounts mentioned in such notice; or for a reference to a master for the like purpose; and in case the judge shall think a reference to a master proper, the same may be made *ex parte* unless the judge shall otherwise direct.

(c) See *supra*, pp. 138, 139.

APPEALS FROM MASTER'S REPORT. (d)

Section 17 of General Order XLII., is altered and varied in the following particular:

Reports become absolute, without order, confirming the same at the expiration of fourteen days after the filing thereof, unless previously appealed from. An appeal shall lie to the court upon motion, at any time from the signing of the report, to the expiration of fourteen days from the filing of the same in respect of the finding of the master upon any matter presented in his office for his decision, without objections or exceptions being previously taken. Master's report absolute in 14 days after filing. Appeals from, how made.

It shall be competent for any party affected by the report to file the same, or a duplicate thereof, and the filing of such duplicate shall have the same effect for the purposes of this order as the filing of the report, by the party taking the same. Party may file duplicate.

(d) See *supra*, pp. 203, 204.

WEDNESDAY, 10TH JULY, 1861.

*Affidavits to state
means of know-
ledge of depo-
nents.*

Each statement in an affidavit, which is to be used as evidence at the hearing of a cause or matter, or of a motion for a decree or other motion, or on any proceeding before the court, (or before the judge in chambers,) shall shew the means of knowledge of the person making such statement. (e)

(e) See *supra*, p. 178.

SATURDAY, 22ND FEBRUARY, 1862.

*Where sales
made before mas-
ter, mode of cer-
tifying same to
court.*

It is ordered that sections 8 and 9, of the 36th of the General Orders of this court of the third of June, 1853, be and the same are hereby repealed; and it is further ordered, that in future all sales are to be with the approbation of one of the masters of this court, who is to report the same to the court, such report to be in the form hereunder set forth, or as near thereto as circumstances will permit, that is to say:

"IN CHANCERY."

(*Title of Cause.*)

"Pursuant to the decree (*or order*) of this honourable court, bearing date the _____ day of _____ and made in this cause, I have, under the General Orders of this court, in the presence of (*or after notice to*) all parties concerned, settled an advertisement and particulars and conditions of sale for the sale of the lands mentioned or referred to in the said decree, (*or order,*) and such advertisement having, according to my directions, been published in the (*naming the newspaper or newspapers*) once in each week for the four weeks immediately preceding the said sale, (*or as the case may be,*) and bills of the said sale having been also as directed by me published in different parts of the township (*town or city*) of _____ and the adjacent country and

MASTER'S REPORT ON SALE.

[ORDER 22ND FEBRUARY, 1862.]

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villages, (or as the case may be,) the said lands were offered for sale by public auction according to my appointment, on the _____ day of _____ by me, (or by Mr. _____ of _____ appointed by me for that purpose, auctioneer,) and such sale was conducted in a fair, open and proper manner, when _____ of _____ was declared the highest bidder for and became the purchaser of the same at the price or sum of £—— (or when sold in different lots, that A. B. became the purchaser of lot No. 1, at the price or sum of £——, C. D., of lot No. 2, at the price or sum of £——, as the case may be;) all which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this honourable court."

Under the printed conditions of sale is to be printed a blank form of contract in these words, or to this effect: Form of contract to be signed by purchaser.
 "I agree to purchase the property (or lot No. —) mentioned in the annexed particulars, for the sum of £——, and upon the terms mentioned in the above conditions of sale," which is to be signed by the purchaser.

(f)

Witness,

This order is to take effect on and after the eighth day of March next.

(f) See *supra*, pp. 156, 157.

MONDAY, 28TH APRIL, 1862.

SITTINGS OF COURT.

Sections 1, 2, 3, 4 and 5, of Order number three of the Secs. 1, 2, 3, 4, and 5. of Order III. of 23rd Dec., 1857, discharged. the General Orders of 23rd of December, 1857, are hereby abrogated and discharged.

The judges of the court will sit separately and by Judges to sit separately. alternate weeks, as follows :

SITTINGS OF COURT.—PROCEDURE.

[ORDER 28TH APRIL, 1862.]

One judge to sit
daily in each
week.

One judge will sit daily in each week for the despatch of all business other than re-hearings and chamber business.

How business is
to be taken.

The business before such judge will be taken as follows :

Monday.—Motions.

Tuesday, } —Hearings *pro confesso* ; motions for
Wednesday. } decree; further directions; appeals from
Master's reports.

Thursday, } —Hearings of causes ; demurrers, (ex-
Friday, } cepting during the re-hearing term.)
Saturday.

SETTING DOWN CAUSES.

Causes to be set
down 14 days.

The party who desires to have a cause set down to be heard, is to enter it with the registrar for that purpose, at least fourteen days before the day for which the same is set down.

LISTS TO BE PREPARED BY THE REGISTRAR.

Lists to be pre-
pared, and causes
called on and
heard according
to lists.

The registrar is to prepare lists of all causes entered for hearing, making a separate list of all the causes to be heard before each judge. Each cause is to be set down in the order in which it has been entered with the registrar. Causes are to be called on and heard according to the registrar's list, unless the court order otherwise.

NOTICE OF HEARING.

Twelve days' no-
tice of hearing to
be given.

Notice of hearing must be served by the party setting down the cause, upon all proper parties, for a proper day

falling within the week in which the judge in whose list the same is set down is to sit, and such notice is to be served not less than twelve days before the day for which such notice is given.

RE-HEARING OF CAUSES. (g)

There are to be four re-hearing terms in each year, Terms for re-hearing causes. commencing respectively as follows :

- 1.—The second Thursday in March.
- 2.—The first Thursday in June.
- 3.—The second Thursday in September.
- 4.—The first Thursday in December.

All re-hearings of cases are to be in re-hearing term Re-hearings to be in term only. only.

Applications in the nature of re-hearings to discharge So also are applications in the nature of re-hearings unless by leave of court. or vary Orders made in court, are to be made in re-hearing terms only, except with the leave of the judge pronouncing the Order sought to be discharged or varied.

(g) See *supra* pp. 80, 81, *et seq.*

By the Orders of the 9th day of May, 1862, it is provided as follows :

" Causes are to be set down for re-hearing not less than ten days before the commencement of the re-hearing term, for which they are so set down, and notice thereof is to be served upon all proper parties not less than seven days before such re-hearing term."

And by the first Order of those promulgated on the 10th day of January, 1863, it is provided as follows :

" RE-HEARINGS.

I. From and after the first day of April next, all re-hearings of causes are to be within six months after the decree or decretal order shall have been passed and entered ; and applications in the nature of re-hearings to discharge or vary orders made in court, not being decretal orders, are to be within four months from the passing and entering of the same ; or within such further time as the court or any judge thereof may allow upon special grounds therefor, shewn to the satisfaction of the court or judge."

274 APPEALS FROM CHAMBERS.—EXAMINATION OF PARTIES.
[ORDER 28TH APRIL, 1862.]

APPEALS FROM ORDERS MADE IN CHAMBERS. (A)

Judge to sit in chambers.

One judge will sit daily in each week for the despatch of business in chambers.

When such applications to be heard.

Matters adjourned from chambers under section third of Order thirty-four of the General Orders of the 3rd of June, 1853, and applications in the nature of re-hearings to discharge or vary orders made in chambers, are to be heard in full court on the last Wednesday of every month, except during examination terms.

When orders to take effect.

The foregoing Orders are to come into operation on the twelfth day of May next. But causes may be set down and notices may be given of proceedings to be taken under the said Orders, from the day of the date hereof.

(b) See *supra* pp. 148, *et seqq.*

Depositions in other causes to be used without order.

READING DEPOSITIONS IN OTHER CAUSES. (i)

Any party shall be entitled in future upon notice without order to use depositions taken in another suit in cases where, under the present practice, he is entitled to use such depositions upon obtaining the common order for that purpose.

(i) See *supra* pp. 250, *et seqq.*

EXAMINATION OF PARTIES TO S.

Parties to suits to be examined without order.

Any party defendant may be examined as a witness without order, on behalf either of the plaintiff or of a co-defendant. And any party plaintiff may be examined as a witness without order, by a co-plaintiff, or by a defendant, in cases where under the present practice such examination may be had upon the common Order being obtained for that purpose.

(k) See *supra* pp. 248, *et seqq.*

RE-TAXATION OF COSTS.—PETITIONS.
[ORDERS 28TH APRIL, AND 9TH MAY, 1862.]

275

RE-TAXATION OF COSTS. (D)

It shall be competent for any party against whom costs have been taxed by a deputy-master of this court, to obtain as of course an order for a re-taxation of the same before the taxing officer of this court at Toronto.

How order obtained.

It shall be the duty of the party obtaining such order to deposit with the deputy-registrar and master with whom the papers are filed, a sufficient sum to cover the expenses of transmitting the same to Toronto, and of the return thereof.

Deposit required to be made with deputy-master.

In case less than one-twentieth be taxed off upon a re-taxation, the costs of such re-taxation shall be added to the bill already taxed.

If less than one-twentieth struck off, the party re-taxing to pay costs.

This Order is to apply to bills of costs already taxed, as well as to bills that may be hereafter taxed, but it is not to apply to cases where the costs have been paid, or final proceedings have been taken upon the taxation of costs already had; process for the levying of such costs is not to be deemed a final proceeding within the meaning of this order.

Applies to costs already taxed but not paid.

(1) See *supra* pp. 218, *et seqq.*

FRIDAY, 9TH MAY, 1862.

A petition filed under the eighteenth section of Order IX., of the General Orders of this court of the 3rd June, 1853, is to be set down to be heard in court in the paper of motions for decrees. And when it is ordered that any new party or any present party may answer the petition, and that the petitioner shall be at liberty to set down the petition again, it is to be set down in like manner, and upon the copy of such petition to serve is to be endorsed the following memorandum or notice, namely: "If you do not appear on the petition the court will

Petitions under sec. 18 of Order IX. of 1853 how to be proceeded with.

[ORDER 9TH MAY, 1862.]

make such order on the petitioner's own shewing as shall appear just," and upon the copy which is to be served of the order to answer such petition when the court shall deem it advisable to make such order is to be endorsed the following memorandum or notice, namely: "If you do not answer the petition the court will make such order on the petitioner's own shewing as shall be just in your absence. And if this order is served personally you will not receive any notice of the future proceedings on such petition." And when the party so served shall answer the petition the same is to be set down to be heard upon notice in the same paper.

Petitions set down to be heard under the foregoing Order are to be set down not less than ten days before the day for which they are so set down, and notice thereof when notice is required is to be served upon all proper parties not less than seven days before such day. (m)

(m) See *supra* pp. 51-53.

The proper course in order to have a re-hearing or an alteration of a decree, or an order which has been enrolled, is to file a petition under Order IX., sec. 18, *supra*, which is substituted for a bill of review. (Knierim v. Schmauss, 8 Jur. N. S. 692; 10 W. R. 860; 7 L. T. N. S. 189; and notes to Order IX. of the Orders of 1863, sec. 18, pp. 51, 52, 53, *supra*.) After decree or order enrolled, any attempt to shew that they are wrong is irregular, until the enrolment has been vacated by order of court. If any body could come to the court and obtain an order varying a decree after it has been enrolled, there would be no end to litigation. (Knierim v. Schmauss, *Ibid*.)

Where it is sought to reverse the decree upon new matter, as upon a deed discovered by the plaintiff since the decree, there must be a petition for leave to file a petition in the nature of a bill of review. (Anon. 2 P. W. 288; Hodson v. Ball, 1 Ph. 177; 11 Sim. 456; Perry v. Phelps, 17 Ves. 177; Berrow v. Morris, 10 Bea. 437; 11 Jur. 790; Taylor v. Taylor, 1 M. & G. 397; Davis v. Bluck, 6 Bea. 393; Bainbridge v. Baddeley, 2 Phil. 705-708; Toulmin v. Copland, 4 Hare, 44, reversed, 2 Ph. 711.)

There can be no error in a decree by consent; therefore such decree cannot be reversed or varied. (Webb v. Webb, 3 Sw. 658.)

Query, can a party in whose favour a decree has been made, ask it to be varied as being less beneficial than he thinks himself entitled to? See the conflicting cases, Glover v. Portington, Freeman, 182-3; Vandebende v. Livingston, 3 Sw. 625.

See further as to petition under Order IX., sec. 18. (Loubier v. Cross, 1 Dick. 223;

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(n) See

PETITIONS; HOW PROCEEDED WITH.
[ORDER 9TH MAY, 1862.]

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Hyde v. Donne, 2 Anstr. 551; Moore v. Moore, 2 Ves. Sr. 598; Lewellen v. Mackworth, 2 Atk. 40; Standish v. Radley, 2 Atk. 177.) And as to the parties who may or may not petition. (Slingsby v. Hale, 1 Ch. Ca. 123; Hartwell v. Townsend, 2 Bro. P. C. 107; Carlisle v. Globe, Free, 148; Bennet v. Lee, 2 Atk. 529.)

As to petitions generally, see Daniell's Ch. P., 3rd ed., 1203; Smith's Ch. P., 7th ed., p. 254. As to petitions to enforce a compromise, see Dawson v. Newsom, 8 W. R. 725; Richardson v. Eyton, 2 DeG., M. & G. 79. The petition must be to the court, an order has been refused when made to chambers. And as to enforcing an undertaking made by a party to the suit, see Sirdefield v. Thacker, 18 Bea. 588. As to carrying into effect decree or orders, see Lord Shipbrooke v. Lord Hinchinbrook, 13 Ves. 393; Winter v. Innes, 4 M. & Cr. 101.

A petition need not be signed by counsel, except in the cases of re-hearing or appeal, and it must be addressed, as in the case of a bill, "To the honourable the Judges of the Court of Chancery." It must state the name and address of the petitioner. So if presented in a cause by a person not a party. (Glazbrook v. Gillatt, 9 Bea. 492.) It must contain a true statement of facts, and is usually verified by an affidavit, an echo of the petition.

Petitions by infants (Howard v. Prince, 14 Bea. 28) or married woman (Jones v. Lewis, 1 DeG. & Sm. 245; but see Crouch v. Walter, 4 DeG. & J. 43) are presented by a next friend; a lunatic by his committee.

A petition may, by consent, be amended at the hearing; (Matson v. Swift, 8 Bea. 368;) but not after the order is drawn up; (Re Marrow, Cr. & Ph. 141;) nor can a fact inconsistent with an existing order be introduced by amendment. (In re Keen, 7 W. R. 577.)

Where an order has been obtained on petition, it cannot in general be discharged on motion; (West v. Smith, 3 Bea. 306;) unless clearly irregular; (Ibid;) and see also In re Dovenby Hospital, 1 M. & Cr. 279; In re Marrow, Cr. & Ph. 142; In re Bunnett, 1 Jur. N. S. 921.

Petitions, other than those under the above order, must be served at least two clear days before the day appointed for hearing unless the court gives special leave to the contrary, which if given should be stated in the fiat which is endorsed on the petition. The evidence on a petition is generally affidavits; and these must be filed before, or on the day the petition is served, following the practice as to notices of motion, and the names of the several deponents, &c., with date of the filing of the affidavits should be endorsed on the copy petition served. In short all the evidence to be used in support of the petition should be stated thereon, that the respondent may know what he has to answer. The deponents to the affidavits may be cross-examined. See pp. 176, *et seq. supra*, as to "Notice of Motion," and the practice thereon.

Causes are to be set down for re-hearing not less than ten days before the commencement of the re-hearing term, for which they are so set down, and notice thereof is to be served upon all proper parties not less than seven days before such re-hearing term. (n)

(n) See *supra* pp. 80, *et seqq.*

[ORDERS 9TH MAY, AND 6TH JUNE, 1862.]

Motion to set
aside proceedings
for irregularity
to specify
grounds.

A notice of motion to set aside any proceeding for irregularity must specify clearly the irregularity complained of. (o)

(o) See *supra* pp. 176, *et seqq.*

Peremptory list
of causes to be
prepared.

The registrar is to prepare a peremptory list of causes set down for hearing for each day on which they are to be heard, and for that purpose the party setting down a cause for hearing is to notify the registrar of the day for which he has given notice of the hearing of such cause not less than seven days before the day for which such notice is given.

6TH JUNE, 1862.

Sections fifteen and sixteen of General Order number nine of the General Orders of this court of the 3rd June, 1853, are hereby abrogated and discharged.

Bills of revivor,
&c., abolished.

Bills of revivor.—Bills of revivor and supplement, original bills in the nature of bills of revivor, and original bills in the nature of supplemental bills are abolished.

Proceedings to
revive suit.

Upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, on the part of any plaintiff or defendant by devise, bequest, descent, or otherwise, it shall not be necessary to exhibit any bill of revivor or supplemental bill, or to proceed by any of the modes provided for by the sections of General Order by this Order rescinded in order to obtain an order to revive such suit, or a decree or order to carry on the proceedings, but an order to the effect of the order to revive, or of the usual supplemental decree under the former practice of this court may be obtained as of course upon præcipe, upon an allegation contained in such præcipe of the

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abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability. And an order so obtained when served upon the party or parties who would be defendant or defendants to a bill of revivor or supplemental bill according to the former practice of this court shall, from the time of such service, be binding upon such party or parties in the same manner in every respect as if such order had been regularly obtained according to such former practice of the court, and such party or parties shall thereupon become thenceforth a party or parties to the suit, provided that it shall be open to the party or parties so served within fourteen days after the service of such order to apply to the court by motion or petition to discharge such order on any ground which would have been open to him or them on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon; provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party, until a guardian or guardians *ad litem* shall have been duly appointed for such party, and the period of fourteen days shall have elapsed thereafter. (p)

(p) See *supra* pp. 45, *et seqq.*

10TH JANUARY, 1863.

RE-HEARINGS. (q)

I. From and after the first day of April next, all re-hearings, within what periods they are to take place.
hearings of causes are to be within six months after the decree or decretal order shall have been passed and entered; and applications in the nature of re-hearings to discharge or vary orders made in court, not being decretal orders, are to be within four months from the

passing and entering of the same; or within such further time as the court or any judge thereof may allow upon special grounds therefor, shewn to the satisfaction of the court or judge.

(g) See Order IX., sec. 17, p. 51, *supra*, and Order XIV., sec. 7 of the orders of June, 1858, p. 80, *et seq. supra*.

Semble, that a person brought before the court by service of notice of the decree under English act, 15 & 16 Vic., ch. 86, sec. 42, (Order VI. of June, 1858, sec. 2,) is entitled to present a petition of re-hearing. (Ellison v. Thomas, 32 L. J. Ch. 2.) The signature of counsel to a petition of re-hearing will not be dispensed with. (Buckeridge v. Whalley, 8 Jur. N. S. 473; 31 L. J. Ch. 416; 10 W. R. 513; 6 L. T. N. S. 312.) This case observes upon Knowles v. Greenhill, 30 L. J. Ch. 670. The rule is that a re-hearing is not a matter of right like an appeal, which can only be heard upon the evidence used in the court below, but is a privilege accorded only on certain conditions. In a re-hearing fresh materials, and sometimes additional evidence may be used, and the court relies on the signature of counsel as a *prima facie* assurance that there has been some miscarriage at the hearing, which it is desirable to correct by a re-hearing.

HEARINGS. (r)

To take place at
time witnesses
are examined.

II. Causes are to be heard at the same time that the witnesses are examined upon the close of such examination. No evidence to be used on the hearing of a cause is to be taken before any examiner or officer of the court, unless by the order first had of the court or a judge thereof, upon special grounds adduced for that purpose.

Examination of
witnesses when
in any town, &c.,
other than where
papers filed,
pleadings to be
sent to registrar
or deputy.

III. When the examination of witnesses before a judge is to be had in any town or place, other than that in which the pleadings in the cause are filed, it shall be the duty of the party setting down the cause for such examination, to deliver to the registrar or deputy-registrar with whom the pleadings are filed, a sufficient time before the day fixed for such examination, a *præcipe* requiring him to transmit to the registrar or deputy-registrar, at the place where such examination of witnesses is to be had, the pleadings in the cause; and at the same time to deposit with him a sufficient sum to cover the expense

DECREES ON PRÆCIPE, REDEMPTION, FORECLOSURE OR SALE. 281
[ORDER IV., OF 10TH JANUARY, 1863.]

of transmitting and re-transmitting such pleadings, and thereupon it shall be the duty of such registrar or deputy-registrar forthwith to transmit the pleadings accordingly.

The fee payable to the deputy-registrars for setting down causes under the foregoing order is to be two pounds. A fee of £2 to be paid to deputy-registrar on setting down.

(r) See *supra* pp. 252, *et seqq.*

Where at the hearing it appears that the questions at issue are not properly raised by the record, it is in the discretion of the court either to give the plaintiff leave to amend, or to dismiss the bill without prejudice. And where the matters necessary to be introduced into the record are connected with the matters already in issue, the proper course is to give leave to amend. And where such matters are not so connected, the proper course is to dismiss the bill. (The Earl of Darnley v. The London, Chatham and Dover Railway Co., 11 W. R. 388.) The cases of Filkin v. Hill, 4 Bro. P. C. 641; Bierdermann v. Seymour, 1 Bea. 594; were relied upon in support of leave to amend being given; and the case of Watts v. Hyde, 2 Phil. 406, in support of the bill being dismissed. These cases are largely reviewed by the Lords Justices in their judgment on the first mentioned case, reported, 11 W. R. 391.

DECREES FOR REDEMPTION OR FORECLOSURE OF MORTGAGES, OR FOR SALE. (s)

IV. When the time for answering in either of the above classes of cases has elapsed, on production to the registrar of the court, of the affidavit of the service of the bill, and upon præcipe, the plaintiff is to be entitled to such a decree as would, under the present practice, be made by the court, upon a hearing of a cause *pro confesso*, under an order obtained for that purpose; and on every such bill is to be endorsed the following notice: "Your answer is to be filed at the office of the registrar, at Osgoode Hall, in the city of Toronto, (or when the bill is filed in an outer county, at the office of the deputy-registrar at ———.) You are to answer or demur within four weeks from the service hereof, (or when the defendant is served out of the jurisdiction, within the time limited by the order authorising the service.) If you fail to answer or demur within the time above limited, you are to be subject to have a decree or order made

Redemption, foreclosure, or sale. Decree pro confesso to be prepared by registrar on præcipe.

against you forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause. *Note.*—This bill is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above named plaintiff, (and when the party who files the bill is agent, add agents of Messrs. E. F. and G. H., of ———, solicitors for the above plaintiff.) And upon bills for foreclosure or sale is to be added to such notice the following: ‘And take notice that the plaintiff claims that there is now due by you for principal money and interest the sum of ———, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the decree, your interest in the property may be foreclosed [or sold] unless before the time allowed you as by this notice for answering you file in the office above named a memorandum in writing signed by yourself or your solicitor, to the following effect: ‘I dispute the amount claimed by the plaintiff in the cause,’ in which case you will be notified of the time fixed for settling the amount due by you at least four days before the time to be so fixed.’

This Order is not to affect any suit now pending.

(s) See *supra* pp. 67, 76, 77, *et seqq.*

On a first examination of this order, it would seem that it is very limited in its application, the words “on production to the registrar of the court of the affidavit of the service of the bill and upon præcipe” upon which “the plaintiff is to be entitled to such a decree as would, under the present practice, be made by the court upon a hearing of a cause *pro confesso*, under an order obtained for that purpose,” would seem to imply that such a decree could only be obtained in the cases where, under the present practice, the registrar has authority to grant an order *pro confesso* on præcipe. By Order XIII. of the Orders of 1853, the plaintiff is entitled to apply to the registrar for an order to take the bill *pro confesso*, against a defendant, not appearing to be an infant, or person of weak or unsound mind, unable of himself to defend the suit, who has been personally served, within the jurisdiction of the court, provided that he applies for such an order within two months from the date of service of the bill. If

this were the correct reading of the order, it would clearly not apply to cases where the plaintiff had to move for an order *pro confesso*. To obtain an order *pro confesso* against corporations, he has to move in chambers therefor. (Order II. of the Orders of the 17th of March, 1857.) He must also move where the service has not been personal. (See Order XIII., June, 1853, sec. 3.) He must also move where the service has been made out of the jurisdiction of the court, or in the case of publication against an absconding defendant. And also in case of substitutional service, and in cases where the service though personal and made within the jurisdiction, the application is not made before the expiration of two months from the date of service of the bill. (Order XIII., June, 1853, sec. 1.) He must also move in the case of a married woman, defendant.

The order, however, contains internal evidence that it is intended to apply to most of these cases. Hence it is presumed that it will be held to apply to cases of parties served out of the jurisdiction under Order VII., of the Orders of January, 1863.

The notice to be endorsed upon the office copy bill served, (which is made a part of the order,) adopts the following language: "Or when the defendant is served out of the jurisdiction, within the time limited by the order authorising the service."

It is also presumed that it will be held to apply in cases where the service has not been personal, for the language of the continuation of the same notice which is a part of the order favours this construction, "if this notice is served upon you personally, you will not be entitled, &c.," clearly implying that the office copy bill may be served, to come within the terms of this order, other than personally.

Should the order be construed as liberally as it is possible, it would seem that it will apply in all cases, except in the case of a service by publication, which is clearly not within its scope. And it will also apply to married women. But in this case, the order that she may answer separately must be first obtained, and thereafter as she would be treated as a *feme sole*, she would come within the terms of the order. In fine the order would take effect (assuming the foregoing construction) in this wise. In every case where there has been a service, and when the time therefor answering has expired, and the plaintiff is entitled to obtain an order *pro confesso*, he will instead thereof be entitled to such a decree, as would under the present practice be made by the court on a hearing *pro confesso*.

The order will not apply to infants, or persons of weak or unsound mind.

It would appear also that the order is not imperative. The words are, "The plaintiff is to be entitled." He has the option of following the old practice, but it is presumed that his doing so would be at the peril of losing the costs if they are increased thereby.

V. After the first day of February next, all bills of Bills and petitions, how to be complaint and petitions are to be addressed, "To the addressed.
 Honourable the Judges of the Court of Chancery." (t)

(t) See *supra* p. 16.

VI. The signature of a judge shall not be necessary Signature of Judge to writ not necessary.
 to the authentication of any writ.

SERVICE OUT OF JURISDICTION.
[ORDER VII., OF 10TH JANUARY, 1863.]

SERVICE OUT OF JURISDICTION. (u)

Service out juris-
diction under
stat. 20 Vic., ch.
56, sec. 16.

VII. The time within which any defendant served out of the jurisdiction of this court with an office copy of a bill of complaint shall be required to answer the same, or to demur thereto, to be as follows :

1. If the defendant be served in the United States of America, in any city, town, or village within ten miles from Lake Huron, the River St. Clair, Lake St. Clair, the River Detroit, Lake Erie, the River Niagara, Lake Ontario, or the River St. Lawrence, or in any part of Lower Canada not below Quebec, he is to answer or demur within six weeks after such service.
2. If served within any state of the United States not within the limits above described other than Florida, Texas, or California, he is to answer or demur within eight weeks after such service.
3. If served within any part of Lower Canada below Quebec, or in Nova Scotia, New Brunswick, or Prince Edward Island, he is to answer or demur within eight weeks after such service.
4. If served within any part of the United Kingdom, or of the Island of Newfoundland, he is to answer or demur within ten weeks from such service.
5. If served elsewhere than within the limits above designated, he is to answer or demur within six calendar months after such service.
6. The time within which any party served with any petition, notice, or other proceeding other than a bill of complaint, is to answer or appear to the same, is to be the same time as prescribed for answering or demurring to a bill of complaint, according to the locality of service.

(u) See

7. Any party may apply to the court to prescribe a shorter time than is hereinbefore provided for any other party to answer or demur to a bill of complaint, or to answer or appear to any petition, notice, or other proceeding.

8. Any party may apply for leave to serve any other party out of the jurisdiction under the General Orders of this court of June, 1853.

9. Affidavits of service under this Order and of the identity of the party served, may be sworn as follows: If such service be effected in any place not within the dominions of the Crown before the mayor or other chief magistrate of any city, town or borough, in or near which such service may be effected, or before any British consul or vice-consul, or the judge of any court of superior jurisdiction. And if such service be effected in any place within the dominions of the Crown, not within the jurisdiction of this court, such affidavit may be sworn before any the like officer, or any notary public, and in Lower Canada, before any commissioner for taking affidavits appointed under any statute of this province. And such affidavit shall be deemed sufficient proof of such service and identity without proof of the official character, or of the handwriting of the person administering the oath upon such affidavit.

(u) See *supra* pp. 33, 34, *et seqq.*

ORDERS

OF THE

COURT OF ERROR AND APPEAL.

3RD JULY, 1860.

Orders of the
Court of Error
and Appeal,
passed 3rd July,
1860.

Whereas, by an act passed in the twelfth year of Her Majesty's reign, intituled, "An Act to make further provision for the Administration of Justice, by the establishment of an additional Superior Court of Common Law, and also a Court of Error and Appeal in Upper Canada, and for other purposes," it was enacted, that a Court of Judicature should be established in that part of this province called Upper Canada, to be styled "The Court of Error and Appeal," and to be composed of the judges of the Court of Queen's Bench, the Court of Common Pleas, and the Court of Chancery; and that it should be lawful for the said judges of the Court of Appeal, at any time within two years, to make all such general rules and orders as to them might seem expedient for the purpose of adapting the said Court of Appeal to the circumstances of this province, as well in regard to the writs of error or other process by which appeals should be commenced, and the form and mode of suing out such process as in respect of the practice and proceedings of the said court, and also to regulate the allowance and amount of costs, and from time to time to make other rules and orders, amending, altering, or rescinding the same: Provided always, that no such rules or orders should have the effect of altering the principles or rules of decision of the said court or any of them, or of abridging or affecting the right of any party to such remedy as

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before the passing of that act might have been obtained in the Court of Appeal thereby abolished; but might in all respects extend the manner of obtaining such remedy by regulating the practice of the said court in whatever way might to them seem expedient for better attaining the ends of justice; and that all such rules, orders or regulations should be laid before both houses of the Provincial Parliament, if then in session, immediately upon the making of the same, or if the Parliament should not be then in session, then within five days after the meeting thereof; and that no such rule, order or regulation should have effect until within six weeks after the same should have been so laid before both houses of the legislature, and that any such order so made should, from and after such time aforesaid, be binding and obligatory on the said court and all other courts in the said province of Upper Canada to which the same should be made expressly to extend.

It is therefore ordered—

I. That the first process in appeal from judgments of the Court of Queen's Bench or Common Pleas, shall be by a writ of appeal, which may be in the following form:—

UPPER CANADA.

[L. S.] Victoria, &c.

To the Honourable — Chief Justice of the Court of —, greeting:

Whereas, in the record and proceedings, and also in the giving of judgment in a certain suit in our Court of our Bench for Upper Canada (or in the Court of Common Pleas) between A. B. and C. D., in a plea of trespass on the case (or as the case may be) as it is said manifest error hath intervened, as by the said (appellant) we are informed: we therefore, being willing that the error, if any there be, should, according to the laws

Form of writ of
appeal from
Q. B. or C. P.

of Upper Canada, be duly corrected, do command you that without delay you send under the seal of the said court the record and proceedings aforesaid, with all things concerning the same, to our Court of Error and Appeal, that the said Court of Error and Appeal (the record and proceedings aforesaid being seen and examined) may further cause to be done thereupon what of right and according to the laws aforesaid ought to be done.

Witness the Honourable —, Chief Justice, &c.

In what cases
writ to issue,
and upon what
security.

II. That such writ may issue in all cases where by law an appeal lies to this court from the judgment of either of the courts of Queen's Bench or Common Pleas, upon security being perfected as required by the statute in that behalf, and upon a certificate thereof signed by the chief clerk of the court appealed from, together with a *præcipe* for such writ being filed with the clerk of this court; such writ to be issued under the seal of this court and signed by the clerk thereof, and to be tested in the name of the Chief Justice or senior judge thereof for the time being on the day of the same issuing, and to be made returnable on the fifteenth day after the day on which the same shall issue.

Nature of
security.

III. That, unless otherwise specially ordered, such security shall be personal and by bond, and may be in the form prescribed in rule number five, and shall be filed in the principal office of the court appealed from.

IV. That the security for costs required by the statute 12 Vic., c. 63, sec. 40, shall be given by bond to the respondent or respondents in the sum of one hundred pounds, being the sum named in the statute, which bond shall be executed by the appellant or appellants, or one of them, and by two sufficient sureties, (or if the appellant or appellants be absent from or do not reside in

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VI.
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FORM OF BOND FOR SECURITY.
[ORDERS V. AND VI., 3RD JULY, 1850.]

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Upper Canada, then by three sufficient sureties,) and the conditions thereof shall be to the effect that the appellant or appellants shall and will effectually prosecute his or their appeal, and pay such costs and damages as shall be awarded in case the judgment appealed from shall be affirmed or in part affirmed. The bond and conditions may be in the form given by rule number five.

Security for
costs under 12
Vic., ch. 63.

V. That the bond for securing costs shall be in the following form:

Form of bond
for security for
costs.

Know all men by these presents that we, A. B. of —, C. D. of —, and E. F. of —, are jointly and severally held and firmly bound unto G. H. of —, in the penal sum of — lawful money of Canada, for which payment well and truly to be made we bind ourselves and each of us by himself, our, and each of our heirs, executors, and administrators respectively, firmly by these presents. Witness our hands and seals respectively, the — day of —, in the year of our Lord —.

Whereas the (appellant) alleges and complains that in the giving of judgment in a certain suit in her Majesty's Court of Queen's Bench, (or the Court of Common Pleas, as the case may be) in Upper Canada, between (the defendant) and (the appellant) in a plea of —, manifest error hath intervened, wherefore the said (appellant) desires to appeal from the said judgment to the Court of Error and Appeal.

Now the condition of this obligation is such, that if the said (appellant) do and shall effectually prosecute such appeal and pay such costs and damages as shall be awarded in case the judgment aforesaid to be appealed from shall be affirmed or in part affirmed, then this obligation shall be void, otherwise shall remain in full force.

VI. That when the judgment to be appealed from directs the payment of money, and the appellant desires to stay the execution thereof, then the bond or security

Amount of
security.

aforesaid shall be double the amount of such judgment, unless the same shall be in debt or bond for a penal sum or upon a warrant of attorney or *Cognovit Actionem* or otherwise, exceeding in amount the sum really due, in which case the bond shall be in double the true or real debt and costs only; and the amount so recovered, and of such true and real debt and costs shall be stated in the condition or recital to the condition of the bond or security, immediately after the statement of the nature of the action, and the condition shall be to the effect that the said (appellant) shall effectually prosecute such appeal, and if the said judgment so to be appealed from or any part thereof shall be affirmed, shall pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed (if it be affirmed only in part) and all damages which shall be awarded against the said appellant in the appeal: provided always, that in cases where the security to be given shall be in a sum above five hundred pounds, it shall be in the discretion of the court appealed from, or of a judge thereof in vacation, to allow security to be given by a large number of obligors, apportioning the amount among them as shall appear reasonable.

In ejectment;

or question
relating to rent,
&c.

VII. That when the judgment appealed from shall be in an action of ejectment, the security required by the last preceding rule shall be taken in double the yearly value of the property in question; and in cases where the matter in question shall relate to the taking of any annual or other rent, customary or other duty or fee, or any other such like demand of a general and public nature, affecting future rights, the amount in which security shall be taken in addition to the security required for costs shall be fixed by order of a judge of the court appealed from.

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VIII. That the security required by the two last preceding rules shall be given by bond, and the recitals and condition in such bond shall be such as shall conform to the provisions of the said two rules, with such further or other conditions, in cases where the judgment is not for the payment of a sum of money only, as the judge approving such security may think fit to order.

To be by bond, unless otherwise directed.

IX. That the parties to such bond, as sureties, shall, by affidavit respectively, make oath that they are resident householders or freeholders in Upper Canada, and severally worth the sum mentioned in such bond, over and above what will pay and satisfy all their debts; which affidavit may be in the following form:—

Affidavit of justification of sureties.

In the (style of court.)

A. B., plaintiff, } E. F. of —, and G. H. of —,
v. } severally make oath and say: and
C. D., defendant. } first this deponent E. F. for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder in (or a freeholder in) —, and that he is worth the sum of (the sum in which he stands bound by the penalty) over and above what will pay all his debts; and this deponent, G. H., for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder in (or freeholder in) —, and that he is worth the sum of (as the case may be) over and above what will pay all his debts.

(Signed,)

E. F.
G. H.

Sworn by the above named deponents, E. F. and G. H., at —, in the county of —, the — day of —, 18—, before me,

X. Y., A Commissioner, &c.

X. That fourteen days' notice shall be given of the time and place at which application will be made to the court from whose judgment it is intended to appeal, or to a judge thereof in vacation for the allowance of such

Fourteen days' notice of application for allowance of security.

security; which notice shall contain the names and additions of the obligors.

How allowance
to be opposed.

XI. That the allowance of such security may be opposed by affidavit; but that in the absence of any such opposition, the affidavit above mentioned shall be sufficient, in the discretion of the judge, to warrant the allowance thereof.

When allowed.

XII. That, if allowed, the officer of the court shall endorse on such bond the word "allowed," prefixing the date and signing his name thereto; upon which, such security shall be deemed perfected.

Security in cases
under 12 Vic.,
ch. 63, § 40.

XIII. That cases coming within the twelfth Victoria, chapter sixty-three, section forty, numbers two and four, shall be disposed of by special order, as the occasion may require; except that the security thereunder shall be personal and by bond as aforesaid.

When judgment
appealed from is
given on a point
of law not ap-
pearing on the
record.

XIV. *It is ordered*, That if in any case judgment shall be hereafter given in any of the said courts upon a question of law not appearing upon the record, but which judgment would be subject to be reviewed in error, if the question thereby determined were presented to the court on a special verdict, or by bill of exceptions or demurrer to evidence, then in every such case the judgment so given may be appealed from, notwithstanding the question shall not appear upon the record.

Provided, 1st.—That before the expiration of three calendar months from the day on which the decision shall be pronounced, the party intending to appeal shall, by his attorney, file in the office of the clerk of the court in which the cause shall be or shall have been depending, and shall serve upon the opposite party, his attorney or agent, a notice to the following effect:

"The plaintiff (or defendant as the case may be) intends to appeal from the judgment of the court upon the *rule nisi* for nonsuit or for new trial" (or as the case may be.)

2ndly.—That execution shall not be stayed unless security be given as in other cases of appeal.

3rdly.—That in case of any appeal under this rule, the party appealing shall prepare a written statement of the case, and of the question determined, and of the judgment or decision thereon from which he appeals; which, being signed by both parties or their respective attorney or attorneys, and approved of by one of the judges of the court appealed from, shall be transmitted with the transcript of record certified by the clerk.

4th.—That in case the parties or their attorneys shall not agree in such statement, then the appellant may, on summons to the opposite party apply to a judge of the court appealed from to approve of the statement to be submitted to him; which judge, on hearing the other party, or in case of his non-attendance, on hearing the appellant, may approve or modify the statement, as to him shall appear proper.

5th.—That the Court of Appeal may, in its discretion, remit such statement to be amended as may appear necessary for more correctly exhibiting the point or points which have been determined in the court below.

6th.—That when the Court of Appeal shall have determined the matters brought before them under this rule, they shall certify their decision, and send the same to the court below, with such order as to entering judgment for either party or otherwise, as the case shall appear to them to require.

WRIT OF APPEAL.

[ORDERS XV., XVI., AND XVII., 8TH JULY, 1850.]

Writ of appeal to
be endorsed by
clerk of the court
appealed from.

XV. That the writ of appeal from either of the said common law courts, upon being presented to the chief clerk of the court appealed from, shall by endorsement thereon, be allowed by him if the appellant has given the requisite security, such allowance to be as follows :

Allowed the — day of —, 185

(Signature of the Clerk.)

And that when allowed, the said clerk, on payment of legal fees, shall proceed to comply with the order of the writ, and the Chief Justice or some other judge of the court appealed from, shall endorse a return thereon as follows :

By virtue of the within writ, the record and proceedings therein mentioned, are sent under the seal of the Court of —, as within it is commanded ; such record and proceedings being contained in the transcript thereof hereunto annexed and signed by (officer's name), clerk of the said court.

(Signed)

Chief Justice (or Judge.)

XVI. That the clerk of the court shall, in order to such return, cause a fair and full transcript of the judgment appealed from, certified under the seal of the court and signed by him, to be affixed to the writ of appeal ; which transcript, so certified and transmitted, with such further certificate as may be required in cases under the fourteenth rule, shall be deemed a sufficient compliance with the writ.

Transcript of
judgment ap-
pealed from to
be made.

Rule to return
writ of appeal.

XVII. That if any writ of appeal be not duly returned, a rule to return the same may be obtained at any time as of course, on filing a motion paper therefor, with an affidavit of the allowance of the writ and the delivery thereof to the chief clerk of the court appealed from, at least fourteen days previous to such application and of its non-return.

XVIII. That if not returned within four days after service of such rule on the Chief Justice or some other judge, and on the chief clerk of the court appealed from, special application for further proceedings must be made to the Court of Error and Appeal, upon a special affidavit of the circumstances.

If not returned within four days, special application to be made.

XIX. That further time to return such writ may be had upon application to the said Court of Error and Appeal, or to any judge thereof.

Further time to return writ, how obtained.

XX. No rule to allege diminution, nor rule to assign causes of appeal, nor *scire facias quare executionem non*, shall be necessary, in order to compel an assignment of errors.

No rule necessary to compel assignment of errors.

XXI. No rule to certify or transcribe the record shall be necessary; and if the appellant does not, in eight days after the filing of the return of the writ of appeal, file and serve a copy of his grounds of appeal, the respondent may, by notice in writing, demand the same; and if the grounds of appeal are not filed within eight days after service thereof on the appellant, his attorney or agent, the appeal, on proof thereof by affidavit, shall be dismissed with costs.

Appellant to file and serve grounds of appeal within eight days.

XXII. That within eight days after the grounds of appeal shall be filed and served, the respondent shall file and serve his answer or joinder thereto; which, unless it shall be necessary to plead specially, shall be the common plea or joinder of "*in nullo est erratum*;" or if he neglects so to do, the appellant may in writing demand the same; and unless the respondent file his answer or joinder in appeal within eight days after service of such demand, the respondent, his attorney or agent, shall be precluded from filing the same, without the leave of the court or a judge thereof first had and

Respondent to answer in eight days.

obtained, upon a *rule nisi* or summons; and the court will proceed *ex parte* to hear the cause on the part of the appellant, and to give judgment therein without the intervention of the respondent.

Further time.

Provided always, that either party respectively may obtain further time to file the grounds of appeal, or the answer or joinder thereto, by the order of the court or of any judge thereof, upon the return of a *rule nisi* or summons to be issued and served in that behalf.

Notice to be given if appeal is not to be resisted.

Provided also, that if the respondent does not intend to resist the appeal, he may give notice thereof to the appellant; and on proof of such notice, judgment of reversal shall be given for the appellant as of course.

When grounds of appeal served within eight days of the 1st day of July.

Provided also, that in case the grounds of appeal are not filed and served eight days next before the first day of July in any year, then the respondent shall be allowed as many days after the twenty-first day of August next following as will be sufficient to complete such number of eight days within which to file his answer or joinder thereto.

When appeal to be set down for argument.

XXIII. That when the grounds of appeal and answer thereto are filed, the cause shall, on application of either party, be set down for argument by the clerk of this court, for a day to be fixed, of which notice shall be duly given to the opposite party, his attorney or agent, at least four days before the day appointed for the hearing of such appeal.

Copies of pleadings to be delivered to clerk four days before that appointed for argument.

XXIV. Four clear days before the day appointed for argument the appellant shall deliver to the clerk of the Court of Error and Appeal, for the use of the judges thereof, two copies of the judgment of the court below, and of the reasons of appeal, and of the pleadings or

answers thereto; and in default thereof the appeal may be dismissed with costs.

XXV. That the result of the appeal in this court shall be certified to the court appealed from by the clerk under the seal of this court, which certificate shall briefly state that the judgment has been affirmed, reversed or modified (as the case may be,) with or without costs; and when with costs, to be paid by either party, adding the amount thereof when the same shall have been taxed, as taxed; and that upon such certificate being filed in the court below, any entry thereof may be suggested on the roll, and further proceedings in that court be had, according to the course and practice of such court; and in case of any new question arising, according to the course and practice of the Court of Queen's Bench in England.

Result of appeal to be certified by clerk.

Provided that the respondent, if the successful party, may proceed upon the judgment by execution, and upon the bond or security required to be given under the statute and the foregoing rule in that behalf; or he may adopt either course separately, without prejudice to his other remedy by waiver, delay or otherwise.

XXVI. That all writs and all rules and orders of this court in cases appealed shall be tested or bear date the day of their issuing, and be signed by the clerk of the court.

Writs to be tested when issued.

XXVII. That no writ of appeal shall be a superseas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of appeal intended to be argued. Provided, that if the error stated in such notice shall appear to be frivolous, the court or a judge, upon summons and proof

If appeal frivolous, judge may order execution to issue.

APPEALS FROM CHANCERY.—PETITION.

[ORDERS XXVIII. AND XXIX., 8RD JULY, 1850.]

of the service thereof by affidavit, may order execution to issue.

In appeals from Chancery, securities to be by bond; to stand allowed after fourteen days, if not moved against.

XXVIII. That in appeals from the Court of Chancery, all securities under the fortieth section of the said Act of the Provincial Parliament, passed in the twelfth year of the reign of Her present Majesty, chapter sixty-three, shall be in the form of a bond, which, together with the affidavit of justification, shall be filed with the registrar of the said court, and notice thereof served on the respondent, his solicitor or agent; and the same shall stand allowed, unless the respondent shall within fourteen days after service of such notice move the said court to disallow the same. A special application shall be necessary to stay proceedings under any of the exceptions in the said section of the said act.

Petition of appeal, form of; and with whom filed.

XXIX. That the petition of appeal shall be in the form set forth in the schedule to this order. The petition of appeal shall be filed with the clerk of the court, and a copy thereof, together with a notice of the hearing of the appeal shall be served on the respondent, his solicitor or agent, at least two months before the time named in such notice for the hearing of the appeal. Such petition shall not be answered, but at the time named in such notice the parties must attend to argue the appeal; and upon the filing of the petition, and service of a copy thereof and of such notice, the appeal shall stand in the same plight as if the petition had been answered, and such time appointed by this court for the hearing thereof.

The Schedule to the foregoing Order.

IN THE COURT OF ERROR AND APPEAL.

Between —, appellant, and —, respondent.
To the Honourable the Judges of the said court.

The humble petition of the said (appellant) sheweth:
That a (decree or an order) was lately and on —
pronounced by Her Majesty's Court of Chancery for
Upper Canada, in a certain cause depending in the said
court wherein your petitioner was — and the above
named — was —; which said (decree or order) has
since been duly entered and enrolled.

That your petitioner feels himself aggrieved by the
said (decree or order), and he hereby appeals therefrom,
and humbly prays that the same may be reversed or
varied, or that your lordships will make such other order
or decree in the premises as to your lordships shall seem
meet.

And your petitioner will ever pray, &c.
(Certificate of Counsel.)

XXX. That the printed cases shall be and are here-
by abolished, but copies of the pleadings and evidence
shall be printed, as is at present done in the appendix
to the case, to which the reasons of appeal, and for
supporting the decree or order, shall be appended;
and the same rule shall apply to such printed copies and
reasons as now apply to the printed cases, and the same
shall for all purposes be considered the printed cases of
the appellant and respondent respectively. Provided
always, that nothing herein contained shall prevent the
parties from joining in printing such copies as they now
do in printing the appendix, if they shall be so disposed.
Such printed cases must be deposited with the clerk of
the court for the use of the judges, at least four days
before the hearing of the appeal.

Printed cases
abolished; but
appendix to be
furnished.

XXXI. That when it shall be intended to appeal to
Her Majesty in the Privy Council, the securities required
by the statute twelfth Victoria, chapter sixty-three, sec-
tion forty-six, shall be personal and by bond to the re-
spondent or respondents—such bond to be executed by
the appellant or appellants, or one of them, and two

On appeals to the
Privy Council;
what security to
be given.

BOND.—SECURITY.
[ORDER XXXII., 3RD JULY, 1850.]

sufficient sureties (or if the appellant or appellants be absent from or do not reside in Upper Canada, then by three sufficient sureties) in the penal sum of five hundred pounds, in cases coming within the first part of the said section forty six; the condition of which bond shall be to the effect that the appellant (or appellants) shall and will effectually prosecute his (or their) appeal, and pay such costs and damages as shall be awarded in case the judgment (or decree) appealed from shall be affirmed, or in part affirmed, and that execution shall not be stayed in the original cause until security shall further be given by bond, in conformity to the sixth, seventh, and eighth rules, when from the nature of the case such further security shall be requisite: and in cases from Chancery, application to the Court of Appeal to stay proceedings shall be by motion or notice; which motion, if granted, shall be upon such terms as to security under the statute or otherwise, as the circumstances and nature of the case require.

XXXII. That the bond or security referred to in the last rule shall be in the following form:

Know all men by these presents, that we, A. B., of —, C. D., of —, and E. F., of —, are jointly and severally held and firmly bound unto G. H., of —, in the penal sum of — of lawful money of Canada, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, executors, and administrators respectively, firmly by these presents. Witness our hands and seals respectively, the — day of —, in the year of our Lord —.

Whereas (the appellant) alleges and complains, that in the giving of judgment in a certain suit in her Majesty's Court of Error and Appeal in Upper Canada, between (the respondent) and (the appellant) — manifest error hath intervened: wherefore the said (appellant) desires to appeal from the said judgment to her Majesty, in her Majesty's Privy Council:

Now the condition of this obligation is such, that if the said (appellant) do and shall effectually prosecute such appeal and (or) pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from shall be affirmed, or in part affirmed, then this obligation shall be void otherwise shall remain in full force.

XXXIII. That in every case of appeal to her Majesty in Council, the obligors, parties to any bond as sureties, shall justify their sufficiency by affidavit, in the manner and to the same effect as is required by rule number nine of this court.

XXXIV. In cases appealed from either of the courts of common law, or from the Court of Chancery, the same fees and allowances shall be taxed in appeal by the clerk of the Court of Error and Appeal for attorneys and solicitors, or any officer of the said court, as are allowed for similar services in the court from which the appeal shall have been brought; and that counsel's fees shall be taxed in the discretion of the clerk, provided that no fee to counsel exceeding ten pounds shall be taxed without an order of the judge who presided on the argument, or in his absence of the next senior judge.

XXXV. That the regular and appointed days or times of sitting of this court shall be the second Thursday after the several terms of Hilary, Easter and Michaelmas, as appointed by the statute 12 Vic., ch. 63, sec. 13, at eleven o'clock in the forenoon: provided, however, that the said court may adjourn from time to time, and meet at such other periods as shall be appointed for the hearing and disposing of any business brought before it.

[ORDER 27TH JUNE, 1856, AND ORDER 21ST DECEMBER, 1858.]

FRIDAY, 27TH JUNE, 1856.

Ordered, that copies of the pleadings and evidence shall be printed, in all cases appealed, together with the reasons of appeal, and the reasons relied upon for supporting the judgment, decree, or order, and the opinions of the judges in the courts below, when not published in the reports, which copies shall for all purposes be considered the printed cases of the appellant and respondent respectively, and a copy must be deposited with the clerk of the court for the use of each of the judges at least four days before the hearing of the appeal.

TUESDAY, 21ST DECEMBER, 1858.

It is ordered that, after the present sittings of this court, the clerk shall receive no appeal books unless they be printed, on one side only, on good paper, in demy quarto form, with small pica type.

It is ordered that in all cases in which the case for appeal is required to be settled by any judge of either of the courts, the appellant shall serve on the opposite party a copy of the case he intends to submit for the judge's approval, at least four days before the application to have the case settled.

ORDERS, RULES AND REGULATIONS,

OF THE

PRIVY COUNCIL,

IN THE MATTER OF APPEALS BROUGHT TO HER
MAJESTY FROM THE COLONIES.

PASSED 13TH JUNE, 1853.

Whereas there was this day read at the Board a Report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 30th of May last past, humbly setting forth that the Lords of the Judicial Committee have taken into consideration the practice of the Committee with a view to greater economy, despatch, and efficiency in the appellate jurisdiction of her Majesty in Council, and that their Lordships have agreed humbly to report to her Majesty that it is expedient that certain changes should be made in the existing practice in appeals, and recommending that certain rules and regulations therein set forth should henceforth be observed, obeyed and carried into execution, provided her Majesty is pleased to approve the same:

Her Majesty having taken the said Report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of the rules and regulations set forth therein, in the words following, *videlicet*:—

1. That any former usage or practice of her Majesty's

Appellant, when
successful, may
recover costs of
appeal.

Privy Council notwithstanding an appellant, who shall succeed in obtaining a reversal or material alteration of any judgment, decree, or order appealed from, shall be entitled to recover the costs of the appeal from the respondent, except in cases in which the Lords of the Judicial Committee may think fit otherwise to direct.

Transcripts to be
sent to Registrar
of Privy Council.

II. That the registrar or other proper officer having the custody of records in any court or special jurisdiction from which an appeal is brought to her Majesty in Council be directed to send by post, with all possible despatch, one certified copy of the transcript record in each cause to the registrar of her Majesty's Privy Council, Whitehall; and that all such transcripts be registered in the Privy Council Office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from; and that such transcript be accompanied by a correct and complete index of all the papers, documents, and exhibits in the cause; and that the registrar of the court appealed from, or other proper officer of such court, be directed to omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; and that especial care be taken not to allow any document to be set forth more than once in such transcript; and that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit; and that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the registrar or other officer preparing the same.

III. That when the record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the registrar or other proper officer of the court from which the appeal is brought, shall be bound to send home the same in a printed form, either wholly or so

TRANSCRIPTS; PRINTED AND WRITTEN.
[ORDER IV., 13TH JUNE, 1853.]

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far as the same may have been printed, and that he do certify the same to be correct, on two copies, by signing his name on every printed sheet, and by affixing the seal, if any, of the court appealed from to these copies, with the sanction of the court.

Transcripts may be printed abroad.

And that in all cases in which the parties in appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio, and transmitted at their expense, to the registrar of the Privy Council, two of which printed copies shall be certified as above by the officers of the court appealed from; and in this case no further expense for copying or printing the record will be incurred or allowed in England.

IV. That on the arrival of a written transcript of appeal at the Privy Council Office, Whitehall, the appellant, or the agent of the appellant prosecuting the same, shall be at liberty to call on the registrar of the Privy Council to cause it, or such part thereof as may be necessary for the hearing of the case, and likewise all such parts thereof as the respondent or his agent may require, to be printed by her Majesty's printer, or by any other printer on the same terms, the appellant or his agent engaging to pay the cost of preparing a copy for the printer at a rate not exceeding one shilling per brief sheet, and likewise the cost of printing such record or appendix, and that one hundred copies of the same be struck off, whereof thirty copies are to be delivered to the agents on each side, and forty kept for the use of the Judicial Committee; and that no other fees for solicitors' copies of the transcript, or for drawing the joint appendix, be henceforth allowed, the solicitors on both sides being allowed to have access to the original papers at the Council Office, and to extract or cause to be extracted and copied such

Written transcripts to be printed by Her Majesty's printer.

[ORDERS V. AND VI., 18TH JUNE, 1858.]

parts thereof as are necessary for the preparation of the petition of appeal, at the stationer's charge, not exceeding one shilling per brief sheet.

Transcripts to be printed within a certain time.

V. That a certain time be fixed within which it shall be the duty of the appellant or his agent to make such application for the printing of the transcript, and that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof in all matters brought by appeal from Her Majesty's colonies and plantations east of the Cape of Good Hope, or from the territories of the East India Company; and within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad; and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order, and that a report of the same be made to the Judicial Committee by the registrar of the Privy Council at their Lordships' next sitting.

Appeals may be heard in the form of a special case.

VI. That whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the agents of the parties, with the sanction of the registrar of the Privy Council, may submit such question of law to the Lords of the Judicial committee in the form of a special case, and print such parts only of the transcript as may be necessary for the discussion of the same; provided that nothing herein contained shall in any way bar or prevent the Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that in order to promote such arrangements and simplification of the matter in dispute, the registrar of the Privy Council may call the agents of the parties

SPECIAL CASE.

[ORDER VI., 18TH JUNE, 1863.]

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before him, and having heard them, and examined the transcript, may report to the committee as to the nature of the proceedings.

And Her Majesty is further pleased to order, and it is hereby ordered, that the foregoing rules and regulations be punctually observed, obeyed, and carried into execution in all appeals or petitions and complaints in the nature of appeals brought to Her Majesty, or to her heirs and successors in council, from Her Majesty's colonies and plantations abroad, and from the Channel Islands or the Isle of Man, and from the territories of the East India Company, whether the same be from courts of justice or from special jurisdictions, other than appeals from Her Majesty's Courts of Vice-Admiralty, to which the said rules are not to be applied.

Whereof the judges and officers of Her Majesty's courts of justice abroad, and the judges and officers of the superior courts of the East India Company, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

MISCELLANEOUS POINTS ON THE ORDERS.

INTEREST.

As to allowing interest on the arrears of an annuity which the testator in the suit had covenanted to pay, see *Jenkins v. Briant*, 16 Sim. 272, and cases there cited; and *Lainson v. Lainson*, 18 Bea. 7. Interest will not in general be given from a period anterior to the decree. (*Fowler v. Fowler*, 4 DeG. & J. 250, 275.) A creditor is not entitled to interest "from the date of the decree," on a debt which accrues due subsequently thereto. (*Lainson v. Lainson*, 18 Bea. 7.) As to the cases of allowing or disallowing interest upon interest, see *Gladwyn v. Hitchman*, 2 Ver. 135; *Butler v. Duncomb*, 1 P. W. 458; *Brown v. Barkham*, 1 P. W. 653; *Whatton v. Cradock*, 1 Keen, 267; *Turner v. Turner*, 1 J. & W. 39, 47; *Perkyns v. Baynton*, 1 Bro. C. C. 574; *Combe v. Acland*, Dick. 436; *Shepherd v. Titley*, 2 Atk. 350; *Sackett v. Bassett*, 4 Mad. 58; *Fergusson v. Fyffe*, 8 C. & F. H. L. 121; *Ex parte Bevan*, 9 Ves. 223; *Chesterfield v. Janssen*, 2 Ves. Sr. 151; *Brewin v. Austin*, 2 Keen, 211; *Howard v. Harris*, 2 Ver. 195; *Knapp v. Burnaby*, 9 W. R. 765. And it is now a settled rule that no interest will be allowed on interest reported due, except in the case of a subsequent incumbrancer paying off a prior one under a foreclosure or redemption decree. (Compare the preceding cases.)

It would seem that in giving interest equity follows the law. (*Parker v. Hutchinson*, 3 Ves. 135; *Upton v. Ferrers*, 5 Ves. 303; *Boddam v. Ryley*, 1 Bro. C. C. 239; *Lowndes v. Collens*, 17 Ves. 29.)

The master's report does not make a sum found due carry interest under Con. St. U. C., cap. XLIII. (*Mansfield v. Ogle*, 4 DeG. & J. 38, 42.)

Interest may be directed to be computed by the decree on further directions though not directed before. (*Flintoff v. Haynes*, 4 Hare, 309.)

A mortgagee is not entitled under 3 & 4 Will. 4. ch. 27, sec. 42, (Eng.) to recover as against a second mortgagee and subsequent incumbrancers, the arrears of interest due on his mortgage for more than six years, by reason of an acknowledgment in writing by the mortgagor of the sum due in respect of interest. (*Bolding v. Lane*, 11 W. R. 386.) The words in the 42nd section, "by whom the same is payable," denote not merely those who are legally bound by contract to pay the interest, but all against whom payment may be enforced by any action or suit. (*Ibid.*) This decision reverses same case, reported 3 Gif. 561; 10 W. R. 556. See also *Roddam v. Morley*, 1 DeG. & J. 1; 5 W. R. 510. The cases of *Hodges v. Croydon Canal Co.*, 3 Bea. 86; *Hunter v. Nockolds*, 1 M. & G. 641; *Hughes v. Kelly*, 3 D. & W. 482; *Greenway v. Bromfield*, 9 Hare, 201; decide that no more than six years' arrears of interest are recoverable under the 42nd section. But before the courts had arrived at this conclusion as the true construction of the statutes it had been held by *Wigram, V. C.*, that under the before-mentioned statutes a mortgagee of land whose mortgage debts and interest were secured also by a bond or covenant was entitled in a foreclosure suit to charge the mortgaged estate with the full arrears of interest accruing on the mortgage debt within twenty years before the institution of the suit. (*DuVigier v. Loe*, 2 Hare, 326.) The price of redeeming the mortgaged premises is the same in a suit by the mortgagor to redeem, as it would be in the like circumstances in a suit by the mortgagee to foreclose. (*Ibid.*) If the debt and interest are secured only by the mortgage, the mortgagee is entitled to no more than six years' arrears of interest, *semble*. (*Ibid.*) See also *Elvy v. Norwood*, 5 DeG. & Sm. 240; 16 Jur. 493; and *Sinclair v. Jackson*, 17 Bea. 405. But *DuVigier v. Loe* was a foreclosure suit.

A mortgage deed recited an agreement to secure the money with interest, but the proviso for redemption on a day certain, and the covenant to pay and the trusts of a

produce of a sale were restricted to the principal only. Held, that interest was payable. (*Astwell v. Staunton*, 80 Bea. 52.)

INJUNCTIONS.

Injunctions to stay proceedings at law, have already been considered pp. 119-128, *supra*. It remains to consider in what cases they will be granted to restrain wrongful acts of a special nature.

These cases may be classified under the following heads:—

1. Breaches of contract, trust, or confidence, in which case the injunction will be granted irrespective of damage. (*Tipping v. Eckersley*, 2 K. & J. 264.)

See *Drewry on Injunctions*, pp. 250-278; *Sup.* 60-68, and cases there cited. And see also *Sevin v. Deslandes*, 7 Jur. N. S. 837; 30 L. J. Ch. 457; 9 W. R. 218; *Spurgin v. White*, 7 Jur. N. S. 15; 9 W. R. 266; 3 L. T. N. S. 609; *Giles v. Hart*, 5 Jur. N. S. 1381; 1 L. T. N. S. 154; *Duignan v. Walker*, 1 Jo. 446; 5 Jur. N. S. 976; 28 L. J. Ch. 867; *Piggott v. Stratton*, 29 L. J. Ch. 1; 1 L. T. N. S. 111.

Injunction to restrain a breach of a farming covenant granted; (*Fleming v. Snook*, 5 Bea. 250;) to restrain a breach of covenant secured by forfeiture of the lease and a penalty; (*Barret v. Blagrave*, 5 Ves. 555;) and the court granted an injunction prohibitory in form, but mandatory in its effect, against a lessee of mines acting in contravention of the covenants, in permitting a communication to remain open with an adjoining mine and water to flow therefrom. (*Earl of Mexborough v. Bower*, 7 Bea. 127.)

Query, as to the power of the court to award damages in certain cases. And on granting an interim injunction, is it not insisted that the plaintiff must undertake to abide by such or any order which the court may make as to damages. (*Tuck v. Silver*, Johns. 218; *Ingram v. Stiff*, Jo. 220, n.)

As to the rule of decreeing specific performance and awarding damages, see *Rogers v. Challis*, 27 Bea. 175; 7 W. R. 710; *Chinnock v. Sainsbury*, 9 W. R. 7; in this latter case it was held that no damages would be granted where the agreement was one which the court had not the jurisdiction to enforce. See also *Norris v. Jackson*, 1 J. & H. 319; 7 Jur. N. S. 540; *Soames v. Edge*, Johns. 669; *Darbey v. Whitaker*, 4 Drew. 134; *Collins v. Stuteley*, 7 W. R. 710. Courts of equity have an inherent jurisdiction to award damages for the non-performance of an agreement which they are empowered to enforce. (*Nelson v. Bridges*, 2 Bea. 289; *Prothero v. Phelps*, 25 L. J. Ch. 105; *Lillie v. Legh*, 3 DeG. & J. 204.)

2. Infringement of copy-right or patent-right. Such injunctions will now be granted on a *prima facie* title being shewn. (*Drewry on Injunc.* 192-226; *Sup.* 32-52.) See as to evidence necessary to support such *prima facie* title, *Daniell's Ch. Pr.* 3rd Edit. 1287; *Drewry*, 226; *Mayer v. Spence*, 1 J. & H. 87; 8 W. R. 559.

3. Obstruction of ancient lights or lights derived from a common landlord; (*Davies v. Marshall*, 9 W. R. 368;) or alteration of windows so as to enlarge easement already acquired. (*Cooper v. Hubbuck*, 9 W. R. 352; *Renshaw v. Bean*, 18 Q. B. 113; *Wilson v. Townsend*, 9 W. R. 30.) An injunction to restrain the obstruction of ancient lights, refused on the ground of delay, the bill being retained with liberty to proceed at law. (*Cooper v. Hubbuck*, 30 Bea. 160.) See also *Gale v. Abbot*, 8 Jur. N. S. 987; 10 W. R. 748; 6 L. T. N. S. 852; *Simper v. Foley*, 2 J. & H. 555; 5 L. T. N. S. 669.

4. Waste and trespass. (*Daniell's Ch. P.* 1223-1229.) See also *Dewry on Injunctions*, pp. 184-190; *Sup.* 21-31. The court will restrain a purchaser from doing

[INJUNCTION.]

acts of waste and destruction, and will restrain a partner from doing an intentional serious injury to the partnership property. (*Marshall v. Watson*, 25 Bea. 501.) But the court cannot interfere in cases of mere *permissive* waste by a tenant for life. (*Powys v. Blgrave*, 1 Kay, 495; 4 DeG. M. & G. 448.)

An injunction may be obtained against a tenant from year to year, after a notice to quit, to restrain him from removing the crops, &c., according to the usual course of husbandry. (*Onslow v. —*, 16 Ves. 173; *Pratt v. Brent*, 2 Mad. 62.)

The court will grant an injunction in cases where the aggrieved party has equitable rights only, and it has been said that the court will grant it more strongly where there is a trust estate. (*Robinson v. Litton*, 3 Atk. 209; *Garth v. Cotton*, 1 Dick. 183; 1 Ves. Sr. 555; *Stansfield v. Habbergham*, 10 Ves. 277.) Take for instance the cases of mortgages, and see *Farrant v. Lovel*, 3 Atk. 723; *Humphreys v. Harrison*, 1 J. & W. 581; *Eden on Injunctions*, 165, 166; *King v. Smith*, 2 Hare, 239; *Vincent v. Spicer*, 22 Bea. 380; it must appear, however, that by the waste committed (such as the felling of timber by the mortgagor) that the security would be insufficient or scanty without the timber. (*Hippesley v. Spencer*, 5 Mad. 422; *King v. Smith*, *supra*.)

5. Nuisance either of a public or a private nature. (*Attorney-General v. Nichol*, 16 Ves. 342; *White v. Cohen*, 1 Drew. 312.) See also *Drewry on Injunctions*, pp. 237-249; *Sup.* 68-69; *Beardmore v. Tredwell*, 7 L. T. N. S. 207; *Bankhart v. Houghton*, 5 Jur. N. S. 282; 28 L. J. Ch. 473; 7 W. R. 197; 32 L. T. 382; *Wicks v. Hunt*, 1 Jo. 372.

6. Alienation, or in some cases, removal out of the jurisdiction of property attended by gross or irremediable injustice. (*Daniell's Ch. P.* 1241; *Dyke v. Taylor*, 9 W. R. 403.)

7. Interpleader suits. In such cases the injunction will only be granted on an affidavit of no collusion, annexed to or filed with the bill; (*Jones v. Shepherd*, 9 W. R. 216;) and on payment of the rent (*Townley v. Deare*, 3 Bea. 213) or money (*Pauli v. Von Melle*, 8 Sim. 326) into court. See also *Drewry on Injunctions*, pp. 321-327; *Sup.* 75-76.

The rules by which the court will be guided in granting or withholding injunctions in all these cases, are the rules which guide it in the ordinary administration of justice, except that any delay or laches in asking for the injunction will be regarded with more than ordinary jealousy. (*Wintle v. Bristol Railway Co.*, 10 W. R. 210.)

Where the injunction is obtained *ex parte*, any material suppression of facts will be a ground for its dissolution; though it seems a plaintiff is not afterwards precluded from making another application on the real merits. (*Fitch v. Rochfort*, 18 L. J. Ch. 468.) Where a plaintiff has obtained an injunction on the merits, suppressing material facts, he cannot, on a motion to dissolve it, support it on the merits then disclosed. (*Hilton v. Lord Granville*, 4 Bea. 130; *Fisken v. Rutherford*, 7 U. O. L. J. 124.) But see *Fitch v. Rochfort*, (*supra*.)

Leave may be given to serve the notice of motion with the bill, but not before the bill is filed; (*Simmons v. Heaviside*, 22 Bea. 412;) the leave must be stated in the notice; (*Hill v. Rimell*, 2 M. & Cr. 641;) and see *Hart v. Tulk*, 6 Hare, 611.

A plaintiff cannot obtain an injunction pending a demurrer. (*Cousins v. Smith*, 13 Ves. 164; *Anon v. Bridgewater Canal Company*, 9 Sim. 378.)

He may move in vacation by petition. (*Temple v. Bank of England*, 6 Ves. 771.)

An injunction will not in general be granted unless prayed for, it may however be prayed for in any part of the prayer, even in the prayer for process under the old practice. (*Clark v. Manners*, 2 U. C. Jur. 1.)

Where, however, in a partnership suit, the funds are in danger of misapplication, an injunction and a receiver will be granted though not prayed for by the bill. (*Thibodo v. Scobell*, 5 U. C. L. J. 117.)

So after a decree in a foreclosure suit, an injunction will be granted (on a proper case being made out) restraining the mortgagor in possession from cutting timber or committing waste, though the bill does not pray for an injunction. (*Wright v. Atkyns*, 1 V. & B. 313-4; *Goodman v. Kine*, 8 Beav. 379; *Sawthra v. McGuire*, 5 U. C. L. J. 142.)

But in this case a petition must be presented. His right to an injunction at the hearing is not necessarily prejudiced by his omitting to apply for it at an earlier stage of the cause. (*Davies v. Marshall*, 9 W. R. 368; 4 L. T. N. S. 105; but see *Betts v. Clifford*, 1 J. & H. 77.)

If the plaintiff, pending a notice of motion for an injunction, amends his bill, he waives his notice; (*Martin v. Fust*, 8 Sim. 199; *Monypenny v. Dering*, 1 W. R. 99;) and must pay the costs occasioned by such notice. (*London & Blackwall Railway Co. v. Limehouse Board of Works*, 3 K. & J. 123.) If after obtaining an injunction, he wishes to amend his bill, he must obtain an order to amend without prejudice to the injunction. (*Fisher v. Wilson*, 1 Grant, 222.) This order has been obtained as of course. It has been said that a special application was necessary; (*Pratt v. Archer*, 1 S. & S. 433; *Pickering v. Hanson*, 2 Sim. 488;) but the practice in our court has been to obtain the order on præcipe, if the plaintiff was entitled to an order to amend on præcipe; and see *Warburton v. London and Blackwall Railway Company*, 2 Bea. 253; *Davis v. Davis*, 2 Sim. 515; *Brooks v. Purton*, 1 Y. & C. C. 271; *Attorney-General v. Marsh*, 16 Sim. 572; 13 Jur. 316.

A successful demurrer to the whole bill puts an end to an injunction previously obtained, even though leave be given to amend. (*Schneider v. Lizardi*, 9 Bea. 461.)

If a bill is dismissed, the injunction is in all cases dissolved. (*Hannam v. South London Waterworks Company*, 2 Mer. 61; *Newby v. Harrison*, 9 W. R. 849; 5 L. T. N. S. 12; overruling, *s. c.*, 1 J. & H. 678.)

The evidence to obtain or dissolve an injunction is usually by affidavit, the court however, in a special case and at the request of the parties, examines witnesses before itself at the hearing of the motion. This practice has been followed in England; (*Nichols v. Ibbetson*, 7 W. R. 430;) and in our court in *Fisken v. Rutherford*, 8 Grant's Ch. R. 9, and in several other cases.

The answer of the defendant is to be treated as an affidavit both on motions for, and to dissolve injunctions.

Where the plaintiff amends, pending a motion to dissolve an injunction which he has previously obtained, the defendant must either answer the amendments or be prepared to contend that, allowing them to be true, the injunction should nevertheless be dissolved; (*Fisher v. Wilson*, 1 Grant, 218;) if however the defendant drops his motion the plaintiff should pay the costs incurred before the amendment. (*Ibid.*)

A defendant who had not submitted to be cross-examined upon his answer was not allowed to read it in opposition to a motion for an injunction. (*Wightman v. Wheelton*, 23 Bea. 397; 3 Jur. N. S. 124; 5 W. R. 837; 28 L. T. 816.)

The injunction operates from the date of the order. (*Rattray v. Bishop*, 3 Mad. 220.) The copy of injunction must be served personally. (*Gooch v. Marshall*, 8 W. R. 410; *Ellerton v. Thirsk*, 1 J. & W. 376.) An injunction improperly obtained cannot be treated as a nullity; the defendant must move to discharge it, (*Woodward*

[SOLICITOR.]

v. Earl of Lincoln, 3 Sw. 627,) and prior to its being discharged should act in accordance with it. (Notter v. Smith, Grant's Cham. 21.)

It would seem that service of an injunction on the solicitor of the party affected by it is sufficient, and that a breach of it after such service and before personal service would be a contempt of the injunction. (Andrews v. Maulson, 8 U. C. L. J. 74; *sed query*, see Gooch v. Marshall; Ellerton v. Thirk; cited *supra*.)

See further as to injunctions till the hearing. (Mayhew v. Maxwell, 3 L. T. N. S. 847; Coleman v. West Hartlepool Co., 3 L. T. N. S. 847; Ooddeen v. Oakley, 2 De G. F. and J. 158.)

Where, after committing a breach of an injunction, the defendant left the jurisdiction of the court, substitutional service of the notice of motion to commit the defendant for the contempt was ordered to be made on his solicitor. (Farwell v. Wallbridge, 3 Grant's Chan. Rep. 628.)

SOLICITOR.

A party suing or defending by a solicitor is not at liberty to change his solicitor in the cause without an order of the court for that purpose. And the rule applies where there has been a change in the name of a firm of solicitors. (Muttelbury v. Haywood, 8 Jur. 1085.) But when a solicitor dies pending a suit, no order to change is necessary. (Whalley v. Whalley, 22 L. J. Ch. 632.) Where there has been a change of solicitors without order, service of notice, &c., upon the old solicitor is regular. (Wright v. King, 9 Bea. 161; Davidson v. Leslie, 9 Bea. 104.)

As to how far the lien of a solicitor who is changed in the course of a suit will be affected by that circumstance see Cresswell v. Byron, 14 Ves. 271; Cane v. Martin, 2 Bea. 584; Commerell v. Poynton, 1 Sw. 1; Colegrave v. Munley, T. & R. 400; Bozon v. Bolland, 4 M. & Cr. 854; Heslop v. Metcalfe, 3 M. & Cr. 183. From these cases it would appear that the question depends on whether the solicitor voluntarily withdraws, or is changed by the desire of his client. As to lien see Rawlinson v. Moss, 9 W. R. 788; 8 U. C. L. J. 194; *Re* Smith, 4 L. T. N. S. 43; 9 W. R. 396; *Re* Williams 28 Bea. 465; Webster v. Le Hunt, 9 W. R. 804; Griffiths v. Griffiths, 2 Hare, 587; Cane v. Martin, 2 Bea. 584.

Where a solicitor discharges his client, the client is entitled to the convenient use of his papers, notwithstanding the lien of the solicitor; (Rawlinson v. Moss, *supra*;) when the client receives his papers *query* who should pay the costs of preparing a schedule of them. (*Ibid*.) A dissolution of co-partnership between solicitors operates as a discharge of the clients of such co-partnership. (*Ibid*.)

The court will change a solicitor without making any condition as to paying the solicitor his costs. (Meyers v. Robertson, 1 Grant, 439.) As to solicitor's lien see Wakefield v. Newbon, 8 Jur. 735. A defendant has no right to call upon the plaintiff's solicitor to produce his authority for using the plaintiff's name, particularly if no case of improper conduct on the part of such solicitor is positively alleged and verified. (Chisholm v. Sheldon, 1 Grant, 294.)

It would seem that a compromise of a suit by the solicitor will be binding though made without the consent of the client, (Swinfen v. Swinfen, (Eng.) 5 U. C. L. J. 152; overruling s. c., 4 U. C. L. J. 238; Fray v. Voules, (Eng.) 5 U. C. L. J. 216; Lyndon v. Moss, (Eng.) 5 U. C. L. J. 239.)

All communications made by a client to his solicitor are privileged, not, however, if the solicitor receive the same information from another source, either before or after the communication by the client. (Lewis v. Pennington, (Eng.) 7 U. C. L. J. 219.)

PART THE SECOND.

THE BOOK OF FORMS OF PROCEEDINGS.

FORMS OF TITLE, ADDRESS, AND COMMENCEMENT OF SUITS.

IN CHANCERY.

Title.

Between

John Smith,

Plaintiff.

AND

John Styles,

Defendant.

Address.

To the Honourable the Judges of the Court of Chancery.
City of Toronto. (or wherever the venue may be laid, having regard,
not to where the bill may be filed, but to where the examination
of witnesses is to take place.)

Commencement.

Humbly complaining sheweth unto your Lordships, *John Smith,*
of the City of Toronto, in the County of York and Province of
Canada, Esquire, (a) the above named plaintiff as follows:—

(*If husband and wife.*)—Humbly complaining, &c., *John Smith,*

(a) The proper place of abode and description of the plaintiff must be given, otherwise he will be ordered to give security for costs.

See Order V., sec. 5, of the Orders of June, 1853, pp. 4-10 *supra*, on the subject of security for costs; and Orders XLIII., sec. 6, and XLIV., sec. 4, of the same Orders, as to filing of bond, &c. (Wilkinson v. Lewis, cited *supra* p. 7, is now reported in 8 Jur. N. S. 908; and Jackson v. Davenport, cited *supra* p. 9, in 29 Bea. 212.)

of, &c., and Mary Ann, his wife, (b) the above named plaintiffs as follows:—

(If wife by next friend.)—Humbly complaining, &c., Mary Ann,

Where a defendant has a right to security at any stage in the suit, and with a knowledge of such right nevertheless takes any step in the cause he will as a rule waive his right to security; (Craig v. Bolton, 2 Bro. C. C. 609; Dyott v. Dyott, 1 Mad. 187; Cooper v. Purton, 8 W. R. 702; Melierruchy v. Melierruchy, 2 Ves. Sen. 24;) filing affidavits in answer to a motion for an injunction is not a waiver however. (Murray v. Wilson, 12 Beav. 497.)

A defendant having destroyed the subject of the suit and absconded was ordered to give security for costs, or the plaintiff may dismiss his bill *without* costs. (Knox v. Brown, 1 Cox 859.)

It must be remembered that the rule protecting an officer in actual service in the British army from giving security, is inapplicable to this country. Such a person is considered domiciled in *England*, out of the jurisdiction of the courts of this province. And it is doubtful whether such a person would not be required to give security even though stationed within Upper Canada, for he is liable to be ordered out of the jurisdiction at any moment, and therefore, though stationed, can scarcely be considered as *resident*, within the jurisdiction.

Every defendant appearing by a separate solicitor may require a bond, though the plaintiff has given a general one to all. But though separate bonds be thus given, only one penalty of £100 can be recovered by the whole of the defendants together. (Lowndes v. Robertson, 4 Mad. 465.)

If a plaintiff goes abroad to *reside* pending the suit, he will be ordered to give security, and the proceedings stayed in the meantime. (Busk v. Beetham, 2 Beav. 537; Weeks v. Cole, 14 Ves. 518.)

Where a plaintiff changed his residence but did not go out of the jurisdiction without any intention to mislead, and no enquiry had been made of the plaintiff's solicitor as to his residence, an application for security was refused. (Knight v. Cory, 7 L. T. N. S. 618.)

If a plaintiff, resident out of the jurisdiction, having on that account been ordered to give security, come to *reside* within the jurisdiction, the order will be discharged. (O'Connor v. Sierra Nevada Company, 24 Beav. 485; Matthews v. Chichester, 30 Beav. 185.)

Where the plaintiffs amend by striking out the name of one or more plaintiffs, they will have to give security; (Fellowes v. Deere, 3 Beav. 353); so if one of several plaintiffs causes his name to be struck out of the record, he will have to give security. (Drake v. Symes, 9 W. R. 427; 7 Jur. N. S. 399; 4 L. T. N. S. 192; 30 L. J. Ch. 858.)

If the plaintiff neglects to comply with the order for security, the proper course is to move that he do give security within a limited time, or in default that the bill be dismissed. (Carnac v. Grant, 1 Sim. 348; Veitch v. Irving, 11 Sim. 122; Ford v. Bank of England, 10 Sim. 616; Giddings v. Giddings, 11 Jur. 549; 10 Beav. 29; Wood v. Grey, Esten, V. C., 8th October and 3rd December, 1866.)

(b) The wife is joined as a co-plaintiff with her husband where he is entitled to

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wife of John Smith, the above named defendant, by John Roe, of the city of Toronto, in the county of York and Province of Canada, Esquire, her next friend, (b) the above named plaintiffs, as follows:—

(Infants).—Humbly complaining, &c., John Smith and Mary Ann Smith, of, &c., infants under the age of twenty-one years, by John Roe, of, &c., their next friend, (c) the above named plaintiffs, as follows:—

the subject matter of the suit in her right. Where she is entitled for her separate use, and sues in respect of her own separate rights, she sues by another person, who is called her next friend, making her husband a defendant. The next friend is answerable for the proper conduct of the suit, and for costs. He must also be a solvent person capable of paying costs.

If a married woman does not sue when so entitled as aforesaid, by a next friend, the court will look upon the suit as exclusively that of the husband, and it would not conclude the wife or those claiming under her. (Houlling v. Poole, 1 Grant, 206.) See, however, Platel v. Craddock, 1 C. P. Coop. 469; where the husband having a life estate in remainder was allowed to be a co-plaintiff, the wife, however, being provided with a next friend. It would seem that, since the recent act, Con. Stats. U. C., ch. LXXIII., whatever property a married woman has in her own right is separate estate subject only to the curtesy of the husband. So when in the course of a suit it becomes necessary for a married woman, party to the suit, to make an application on her own behalf, she can only do so by next friend. (Cooney v. Girvin, Grant's Cham. 94; 8 U. C. L. J. 187.)

So also where a married woman claims in opposition to her husband she should sue alone by next friend. (Mitford on Pleading, 28.)

In other cases she must join her husband as co-plaintiff.

See Order IX., sec. 1, page 18, and Order XII., sec. 1, pp. 61, 62, *supra*, for the practice as to married women.

The consent of a married woman must be obtained by the next friend before filing a bill on her behalf, even though she be an infant; (Mitford, 28;) and if filed when she is an infant, she may disavow it on coming of age. (Cooke v. Fryer, 4 Beav. 18.) The next friend must be a person of substance. (See *supra* p. 18, and further Pennington v. Alvin, 1 S. & S. 264; Drinan v. Mannix, 3 Dr. & W. 154; Jones v. Fawcett, 2 Ph. 278; overruling Dowden v. Hook, 8 Beav. 399.)

(c) The bill must contain the address and description of the next friend. See Order IX., sec. 1, pp. 18, 19, but the rule applicable to suits by married women, that the next friend must be a person of substance, does not hold in an infant's suit.

An infant must sue by next friend, and if a bill be filed by an infant without a next friend it will be dismissed, but *without* costs; (Flight v. Bolland, 4 Russ. 298;) any body may be the next friend, even though not a person of substance; (Anon. 1 Ves. 409; Squirrel v. Squirrel, 2 Dick, 765; Davenport v. Davenport, 1 S. & S. 101; Ogilvie v. Herne, 11 Ves. 600;) the consent of the infant is not necessary, and

(*Lunatic.*)—Humbly complaining, &c., *John Smith, of, &c.*, by *John Roe, of, &c.*, committee of the (person and) estate of the said *John Smith*, and the said *John Roe*, the above named plaintiffs. (*d*)

(*Railway Company.*)—Humbly complaining, &c., *The Grand Trunk Railway Company of Canada, &c.*, (*e*)

Information on behalf of lunatic.

Informing sheweth unto your Lordships _____,
Attorney-General of Upper Canada on behalf of C. D. of, &c., a
lunatic, at and by the relation of E. F., of the same place, Esquire,
as follows:—

the bill may even be filed against his strongest remonstrances. (*Andrews v. Cra-
dock, Finch's Prac. in Ch. 376; Cooke v. Fryer, 4 Beav. 16.*)

(*d*) Where a person is of unsound mind, though not found so by inquisition,
a bill may be filed in his name by a next friend.

A lunatic must be a party to a bill, or information filed on his behalf, but an idiot
need not be, as the lunatic may recover, but it is extremely improbable that an idiot
will. (*Attorney-General v. Woolrich, 1 Ch. Ca. 153; but see, Ridler v. Ridler, 1
Eq. Ca. Ab. 279; and Smith's case, 1 Ch. Ca. 112.*)

To a suit instituted on behalf of a lunatic or idiot, it is an invariable rule that the
committee, if there be one, must be a party either plaintiff or defendant. (*Fuller v.
Lance, 1 Ch. Ca. 19.*)

The relator must be a person of substance. (*Attorney-General v. Tiler, 1 Dick,
378; 2 Eden, 280; Attorney-General v. Parkhurst, 1 Ch. Ca. 112.*)

It would seem that where the committee file a bill on behalf of a lunatic, they
should first obtain the leave of the court. (*Shelford on Lunatics, 179, 396, 417.*)

It will be observed that *infants* sue by their next friend; and *lunatics* by their
committees. The suit, however, of a person, not *sui juris* is, both in substance and
in form, by the party actually aggrieved; and accordingly the bill of a married
woman, or an infant must commence as above set forth.

(*e*) Corporations in this province are invariably authorised to sue, and be sued,
in their *corporate capacity*, and in their name as a company, and they then sue in the
name of the company as in this instance. The form in which each particular corpo-
ration can properly sue should be ascertained from the act by which it is incorporated.

If the plaintiffs assume to sue in a *corporate* character, to which they are not
entitled, the course on the part of the defendant is to move to take the bill off the
file. (*The Burgesses of Ruthin v. Adams, 7 Sim. 845.*)

A large body of creditors may be represented by one or more of them, but the bill
must disclose a sufficient reason for departing from the rule requiring all parties
interested to be before the court. An allegation that the creditors are too numerous

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Authority from relator.

Between, &c., (*style of cause.*)

I hereby authorise you to file the above information, and to use my name as the relator therein.

Dated _____ day of _____ E. F.

of _____

To G. H., informant's solicitor.

Authority from next friend.

Between, &c., (*style of cause.*)

I hereby authorise you to institute the above suit and to use my name as the next friend of the infant plaintiff. (*f*)

Dated _____ day of _____ E. F.

of _____

To G. H., plaintiff's solicitor.

to make it practicable to prosecute the suit if they were all made parties, is not sufficient; (*Michie v. Charles*, 1 Grant, 125); and *query* whether such allegation should not be proved. (*Ibid.*)

(*f*) The authority in these cases is compulsory in England, and is required to be filed with the bill under 15 & 16 Vic., c. 86, sec. 11. In this province it is optional with the solicitor to require one or not, but it is doubtless the safer course to obtain one.

PRECEDENTS OF BILLS.

Preliminary observations.—As to the form of bills see Order IX. of the Orders of June, 1853, sec. 1, pp. 16–29, *supra*. As to amendment, Order IX., sec. 9–14, pp. 39–44, *supra*. As to revivor and supplement Order IX., secs. 15 and 16, and Order of 6th June, 1862, pp. 45–50, and 278, *supra*. As to bills of review, Order IX., sec. 17 and 18, pp. 51–53, and 276, *supra*.

Foreclosure suits. (*See form of bill.*)—See Order XXXII. of the Orders of June, 1853, pp. 129–145 *supra*.

As to filing a bill in this court for a sum within the jurisdiction of the county court equity side, and the plaintiff being thereby deprived of costs, see *Cornell v. Curran*, Grant's Cham. 11.

The court will not make a decree of foreclosure or one that amounts to it against persons not before the court, nor can the court make a decree for foreclosure piecemeal. The court will not interfere with the rights of the party having the legal estate to take possession of the property; but before foreclosure can be granted it is essential to have all the parties interested before the court. (*Caddick v. Cook*, 11 W. R. 395; 7 L. T. N. S. 844.) And see *Mit. Pleading*, 32; *Browne v. Blount*, 2 R. & M. 83. English act, 15 & 16 Vic., ch. 86, sec. 42, Rule 9, (the same as Orders of Court of Chancery, U. C., VI., sec. 2, rule 7, June, 1853,) does not authorise the

court to decree a sale of mortgage property in the absence of parties out of the jurisdiction or partly interested in the equity of redemption. *Rogers v. Linton*, Bunb. 200, is no authority for such a practice.

In *Caddick v. Cook*, *supra*, the plaintiff having brought on the cause for hearing without having persons interested in the equity of redemption before the court, was ordered to pay the costs of the day. See however Order 29th June, 1861. But a party to a suit in which a decree of foreclosure has been made in the absence of another party interested in the estate, whose interest was not disclosed in the pleadings is, notwithstanding the imperfection of the suit, bound by the decree of foreclosure. *Semble*, a party to a foreclosure suit whose interest is thereby foreclosed, and who afterwards becomes entitled to an interest in the same estate by devise or otherwise from another person who was not a party to the foreclosure, may bring his bill for redemption. But relief will not be given in such a case on a claim for redemption, stating only that the plaintiff is entitled to the equity of redemption under certain instruments, but not stating any of the proceedings in the foreclosure suit, or the grounds on which the plaintiff seeks to set it aside. (*Bromitt v. Moor*, 9 Hare, 374.)

Bill for specific performance of an agreement.—In a bill by a vendor against a purchaser for the specific performance of an agreement, if the plaintiff relies upon an acceptance or waiver of title by the defendant, as a ground for dispensing with the usual enquiry as to title, there must be a specific charge to that effect, even though facts and circumstances are stated in the bill, which warrant the conclusion that the title has been accepted or waived. (*Clive v. Beaumont*, 1 DeG. & S. 397; *Gaston v. Frankum*, 2 DeG. & S. 561.) This doctrine has also been recognised in subsequent cases.

Taking possession is not of itself a waiver of title, though coupled with other circumstances it will be so held. (*Bown v. Stenson*, 24 Beav. 631; *Haywood v. Cope*, 4 Jur. N. S. 227-8; *Sibbald v. Lowrie*, 18 Jur. 141; *Simpson v. Saddy*, 4 DeG. M. & G. 665.)

It must be borne in mind, however, that acceptance or waiver of title merely precludes the vendee from asking the usual enquiry; so that if a defect in the title transpires incidentally in the course of the suit, the court is bound to take notice of it, if it come under its observation, and will, in such case, refuse specific performance, though the title had been accepted or waived. (*Ward v. Trathen*, 14 Sim. 82; *Wilde v. Gibson*, 1 H. L. Cases, 686; *Warren v. Richardson*, 1 Young, 1.)

As to what is a sufficient signing by "the party to be charged" within the meaning of the Statute of Frauds, see *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Boydell v. Drummond*, 11 East 142; *Wood v. Midgley*, 5 DeG. M. & G. 41; 23 L. J. Ch. 553.

As to part performance taking the case out of the Statute of Frauds, see *Clinan v. Cook*, 1 Sch. & Lef. 41; *Gregory v. Mighell*, 18 Ves. 328; *Morphett v. Jones*, 1 Sw. 172; *Mundy v. Jolliffe*, 5 M. & C. 167; *Dale v. Hamilton*, 5 Hare, 381.

In proceeding against the heir at law of a deceased vendor for specific performance or rescission, the personal representative of such deceased vendor is a necessary party, and the suit will be defective without one, even though an executor "*de son tort*" be a defendant, and though no administration be taken out before the filing of the bill. (*O'Neal v. McMahon*, 2 Grant, 145.)

Before filing his bill the vendor should take care to have all incumbrances cleared off, otherwise he will endanger his right to costs in the whole or in part, for as a rule he is only entitled to costs from the time of completing, and shewing a good title. (*Wilkinson v. Hartley*, 15 Bea. 183.) The fact that he has not a good title at the

time of filing his bill is not a ground for refusing specific performance, if the vendor can make good title before the hearing, (*Wynn v. Morgan*, 7 Ves. 202,) or before report as to title, (*Langford v. Pitt*, 2 P. W. 630; *Jenkins v. Hiles*, 6 Ves. 655; *Seton v. Slade*, 7 Ves. 279; *Mortlock v. Buller*, 10 Ves. 315,) or even on further directions. (*Paton v. Rogers*, 6 Mad. 256.)

It is improper to ask for a rescission of a contract and foreclosure without first asking or offering specific performance. (*McAvoy v. Simpson*, 6 U. C. L. J. 94.)

A *vendee* cannot file a bill for a rescission, he must wait till the vendor seeks to compel specific performance. (*McDonald v. Garrett*, 7 Grant, 606.)

Bill for an account.—Although usual it seems not to be necessary for the plaintiff to submit to account. (*Clarke v. Tipping*, 4 Bea. 588; and see *Inman v. Wearing*, 3 DeG. & S. 781; *Kuebell v. White*, 2 Y. & C. Ex. 15.)

Although the Court of Chancery has jurisdiction to entertain a bill for an account by a principal against an agent, it will not do so when the claim is a mere money demand which may be perfectly well ascertained at law. (*Barry v. Stevens*, 31 L. J. Ch. 785; 10 W. R. 322; 6 L. T. N. S. 568.) As to account by agent against principal, see *Shepard v. Brown*, 11 W. R. 162; 7 L. T. N. S. 499.

In matters of account, courts of law and equity have, generally speaking, a concurrent jurisdiction, and in deciding whether the account shall be taken by a plaintiff in equity or not, the court will be guided by a consideration of what is best, with a view to the convenience of the parties. (*Shepard v. Brown*, *supra*.)

As to practice on accounts, see *Kendall v. Marsters*, 2 DeG. F. & J. 200; *Newen v. Wellen*, 31 L. J. Ch. 792; 10 W. R. 745.

Writ of arrest, formerly called *Ne exeat provincia*.—The bill should contain a prayer for the writ of arrest if the intention of the defendant to leave the province was known to the plaintiff at the time of filing the bill. (*Collinson v. —*, 18 Ves. 353; *Moore v. Hudson*, 6 Mad. 218; *Sharp v. Taylor*, 11 Sim. 50; *Barned v. Laing*, 13 Sim. 255.) If the plaintiff becomes aware of the intention of the defendant to leave the province after the bill is filed, the application for the writ may be made by motion, without filing any amended bill.

The affidavit of the threat or intention to go out of the jurisdiction must be positive, and not merely upon information and belief. (*Jones v. Alephsin*, 16 Ves. 470.)

Bill of Interpleader.—Bills of this kind are not favourably viewed by the court. (*Metcalf v. Hervey*, 1 Ves. Sen. 249; *Sieveling v. Behrens*, 2 M. & C. 591-2.)

A bill of interpleader must shew that each of the defendants claims a right, or they may both demur. (*Metcalf v. Hervey*, *supra*; *Dungey v. Angove*, 2 Ves. 307; *Mitford's Pl.* 58, 164, 165, 166.) And the plaintiff must file with it an affidavit that he does not collude with either of them. (*Stevenson v. Anderson*, 2 V. & B. 410; *Langston v. Boylston*, 2 Ves. 101; *Wood v. Lyne*, 4 DeG. & Sm. 16; *Laraie v. Brown*, 5 W. R. 588; and see *Bignold v. Audland*, 11 Sim. 24; *Jones v. Shepherd*, 29 Bea. 298; affirmed on appeal, 3 DeG. F. & J. 56.)

The bill should show that the plaintiff has a right to compel the defendants to interplead; (*Dungey v. Angove*, 2 Ves. 304;) and that there are no rights or liabilities between the parties except such as relate to the matter in question. (*Crawshaw v. Thornton*, 2 M. & C. 20.)

Where money is the thing claimed it is proper, though not absolutely necessary, that he should offer to pay it into court. (*Meux v. Bell*, 6 Sim. 175; *Bignold v. Audland*, 11 Sim. 23.)

An interpleader suit in equity will now be of rare occurrence, as the courts of law have jurisdiction in most cases under Con. Stat., U. C., cap. XXX.; and see *Ford v. Dillon*, 5 Barn. & Adol. 885.

As to the principle upon which the court acts in interfering at the instance of a plaintiff in such a suit see *Glyn v. Duesbury*, 11 Sim. 189; *Crawshay v. Thornton*, 2 M. & C. 1; *Suart v. Welch*, 4 M. & C. 305; *Jew v. Wood*, 1 Cr. & Ph. 185; *East and West India Dock Co. v. Littledale*, 7 Hare, 57; *Bruce v. Elwin*, 9 Hare, 294; *Farebrother v. Beale*, 3 DeG. & Sm. 637; *Diplock v. Hammond*, 2 Sm. & G. 141; 23 L. J. Ch. 550; *Jones v. Thomas*, 2 Sm. & G. 186; 18 Jur. 460; *Vyvyan v. Vyvyan*, 30 Bea. 65; 8 Jur. N. S. 8; 31 L. J. Ch. 158.

As to the practice and procedure see *Masterman v. Lewin*, 2 Ph. 182; *Angell v. Hadden*, 16 Ves. 202; *Townley v. Deare*, 3 Bea. 213; *Meux v. Bell*, 1 Hare, 73.

Administration suits.—Where an executor or administrator files a bill as such, the bill must allege that probate or letters have been duly taken out of the proper court, though it need not and had better not state the name of the court. (*Humphreys v. Ingledon*, 1 P. W. 752.) The character in which the plaintiff sues need not be stated however in the style or commencement of the bill. (*Ibid.*)

In an administration suit an enquiry as to wilful default will not be directed upon a mere allegation of neglect. Some particular instance must be alleged and proved, so as to raise at all events a case of suspicion in the mind of the court. (*Massey v. Massey*, 32 L. J. Ch. 13; 11 W. R. 19.)

Two suits for the administration of one estate being instituted within five days of each other, and there being no evidence of unfitness on the part of either plaintiff, the court made a decree in both suits, leaving the question as to which should have the control of the proceedings to be decided on a reference. (*Norvall v. Pascoe*, *Thompson v. Pascoe*, 31 L. J. Ch. 456; 10 W. R. 338.)

Partnership.—In a suit to wind up the affairs of a partnership and praying dissolution, all the partners however numerous must be before the court. (*Walburn v. Ingilby*, 1 M. & K. 78; *Evans v. Stokes*, 1 Keen. 32; *Harvey v. Bignold*, 8 Beav. 343; *Deeks v. Stanhope*, 14 Sim. 57.) A few members of a company (not incorporated) may, however, sue on behalf of themselves and the other members. (*Lloyd v. Loaring*, 6 Ves. 773; *Gray v. Chaplin*, 2 S. & S. 267.)

Parties.—*Representation*.—*Generally*.—It is a general rule that all persons materially interested in the subject matter, or any part of it, should be made parties, no matter how numerous they may be. (*Mitford Pl.* 164, and see *Lidbetter v. Long*, 4 M. & C. 286.)

Where, however, the strict observance of the rule would occasion great delay, expense or inconvenience, the rule will be relaxed; (*Mitford*, 170 n. (v);) and see *Richardson v. Hastings*, 7 Beav. 327.

Thus one or more legatees (*Morse v. Sadleir*, 1 Cox 352; *Harrison v. Stewardson*, 2 Hare, 530,) or creditors (*Bateman v. Margerison*, 6 Hare, 496; *Weld v. Bonham*, 2 S. & S. 91; *Handford v. Storie*, 2 S. & S. 196; *Holland v. Baker*, 3 Hare, 68, 70, 76) may sue on behalf of all where they are very numerous. In *Harrison v. Stewardson*, 2 Hare, 530, it was considered that 18 or 20 were not a sufficient number to dispense with making them parties; see further *Hichens v. Congreve*, 4 Russ. 576, and *Michie v. Charles*, 1 Grant, 125.

The parties represented should, however, clearly have a community of interest with the plaintiff, and the relief sought should be beneficial to them. (*Evans v. Stokes*, 1 Keen, 32; *Bromley v. Smith*, 1 Sim. 8; *VanSandau v. Moore*, 1 Russ,

465.) So also the executors and trustees under a will sufficiently represent the legatees and devisees. (See Order VI., Rule 7; *supra* p. 12, and *Wainwright v. Waterman*, 1 Ves. 313; *Brown v. Dowthwaite*, 1 Mad. 448.)

So where it is alleged in the bill and proved or admitted that a necessary party is out of the jurisdiction, the court will generally make a decree against the other parties, in the absence of such party. (*Willat v. Bussby*, 5 Ben. 193; *Paterson v. Holland*, 8 Grant, 288.)

To a bill for redemption, all parties interested in the equity of redemption must be parties. (*Henley v. Stone*, 3 Beav. 355.)

It is generally necessary that the owner of the legal estate should be before the court. (*Rowse v. Hayden*, 2 Grant, 557.)

Query, whether when a party assigns his interest in the subject matter of a suit to trustees for the benefit of his creditors, such trustees should not be brought before the court. (*Barnhart v. Patterson*, 1 Grant, 459; 1 U. C. Jur. 2, 320.)

In a creditor's suit against the devisees of a deceased debtor, the heir-at-law of the deceased is not an indispensable party. (*Fenny v. Priestman*, 1 Grant, 133.)

An existing interest, whether present, vested, or contingent, however future or remote it may be, if it be a present interest, the party representing it has a right to file a bill to have the share secured; but the mere expectation of a future event happening which may give an interest, confers no such right. (*Davis v. Angell*, 8 Jur. N. S. 1024; 10 W. R. 722.)

Where a bill is amended, if the amendment in any one place amounts to more than two folios, the bill must be re-filed, and will bear date on the day of such re-filing. Where, however, the amendment is within the two folios, the amended bill bears the same date as the original bill. (*Wray v. Hutchinson*, 2 M. & K. 235.) *Secus* if matter be introduced by way of supplement or revivor as occurring after the original bill. (*Ibid.*)

If a bill contains general and specific allegations as to the same matter the general allegations must be referred to the specific and particular ones, on the principle that every pleading is taken most strongly against the pleader. (*Ellis v. Colman*, 25 Bea. 662.)

Where the plaintiff erroneously claims title in one capacity, but it appears from his bill that he is entitled in another, the court will give him the relief he asks. (*Fisher v. Wilson*, 1 Grant, 218.)

If the prayer of a bill ask relief which can be granted, the bill will not be demurrable merely because it goes on to ask more which cannot be granted. (*Lewis v. Cooper*, (Eng.) 2 U. C. Jur. App. 1.)

The court will not allow the interest of an infant plaintiff to be prejudiced through the prayer of the bill being badly framed, if all the parties are before the court, and the facts are sufficiently alleged in the bill. (*Walker v. Taylor*, 8 Jur. N. S. 681, in Dom. Proc.)

A bill filed by a solicitor without the authority or consent of the plaintiff, will, on the application of the plaintiff, be taken off the files with costs to be paid by the solicitor; (*Jerdein v. Bright*, 6 L. T. N. S. 279;) the defendants are not necessary parties to such application. (*Ibid.*)

The court considers the motives of a next friend in instituting a suit on behalf of

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[FORM OF BILL OF FORECLOSURE.]

an infant, and if it appear that he had other motives than the benefit of the infant, will deprive him of costs. (Clayton v. Clarke, (Eng.) 8 U. C. L. J. 111.)

Short form of a bill in a foreclosure suit.

1. Under and by virtue of an indenture bearing date the — day of —, and made between the said defendant, C. D. of the first part, E. F. his wife (who was a party thereto for the purpose of barring dower only) of the second part, and your complainant of the third part; your complainant is a mortgagee of certain freehold lands therein comprised, being composed of (*description*) for securing the payment of the sum of £ — and interest.

2. The time for payment of two instalments of interest (which two instalments amount together to the sum of £ —) has elapsed and the same still remain unpaid, by reason whereof the whole of the said principal sum of £ — and interest hath become due and payable, and your complainant is entitled to call in the same.

3. Neither your complainant nor any one on his behalf hath been in the occupation of the said mortgaged lands or in the receipt of the rents and profits thereof.

4. No part of the said sum of £ — hath been paid, but the whole thereof, together with a large arrear of interest thereon, is now, under the circumstances aforesaid, due and unpaid.

5. The defendant C. D. is entitled to the equity of redemption of the said mortgaged lands.

6. Your complainant therefore prays as follows, that is to say:

That he may be paid the said sum of £ — and interest, and the costs of this suit, and in default thereof that the equity of redemption of the said mortgaged lands may be foreclosed, and for that purpose that all proper directions may be given and accounts taken, and that your complainant may have such further and other relief as to your lordships may seem meet.

And your complainant will ever pray, &c.

Form of bill to enforce payment of an annuity.

1. By indenture, bearing date the 26th day of February, A.D., 1848, and made between your complainant of the first part and the

said defendant W. G. of the second part, your complainant, (being then seised in fee of the lands and hereditaments hereinafter described,) in consideration of the price or sum of £55, and of the annuity by the same indenture granted and hereinafter mentioned, conveyed unto the said defendant absolutely in fee the (*description*) and the said defendant, by the same indenture, and in part consideration for the sale and conveyance to him of the said lands, and of the further sum of 5s. by your complainant paid to the said defendant, granted unto your complainant an annuity or clear yearly rent-charge, or annual sum of £30, to be paid and payable for and during the natural life of your complainant, and to be charged and chargeable upon and yearly issuing out of the said lands hereinbefore mentioned and described. To have and to hold the same from the 15th day of July, 1850, the said annuity or rent charge to be paid by four equal quarterly payments of £7 10s. each, on the 15th days of July, October, January and April, in each and every year during the continuance thereof.

2. The said annuity or yearly rent-charge was for some time after the making of the said indenture duly and regularly paid by the said defendant to your complainant, but the said defendant hath of late become very irregular in the payment of the same.

3. There is now due to your complainant the sum of £75 and upwards upon the foot of the said annuity or rent charge, being the amount of twelve quarterly payments thereof up to the 15th day of July, 1859, which the said defendant has permitted to remain due and in arrear, together with interest on such arrears, after deducting therefrom the sum of £25 10s., which the said defendant has paid on account of such arrears and interest.

4. There is not now, and has not been at any time since the said annuity or rent charge fell into arrear as aforesaid, sufficient distress upon the premises to satisfy the arrears due to your complainant, by means whereof your complainant's remedy by distress has become inoperative.

5. Your complainant has no effectual remedy at law for recovery of the said arrears or for raising the same by a sale of the said lands.

[FORM OF BILL TO COMPEL CONVEYANCE OF LEGAL ESTATE BY PURCHASER.]

6. The said defendant is now subject to the said rent charge, the owner in fee of the said lands.

1. Your complainant therefore prays that the said annuity or yearly rent charge may be declared to be well charged on the said land, and that an account may be taken of what is due to your complainant on the foot thereof, and that the said defendant may be decreed to pay unto your complainant the amount which shall be so found due by a short day, to be appointed for that purpose, together with interest thereon and the costs of this suit, and in default thereof that the said lands, tenements and hereditaments, or a competent part thereof, may be sold for the satisfaction thereof, and the proceeds of such sale applied accordingly.

2. And that a receiver may in the meantime be appointed to receive the rents, issues and profits of the said lands, tenements and hereditaments, and that the said defendant may be restrained from receiving any part of the said rents, issues and profits of the said lands, tenements and hereditaments, and from intermeddling in any way with the same, and that for the purposes aforesaid all proper directions may be given and accounts taken, and that your complainant may have such further and other relief as may seem meet.

And your complainant will ever pray, &c.

Bill to compel conveyance of legal estate by the purchaser of the equitable estate.

1. In the year —, the above named defendant, C. D., entered into a contract with the proper officers of the Crown for the purchase of lot number twenty-nine in the eighth concession of East Gwiltimbury, in the county of York, the title to which was then vested in Her Majesty the Queen.

2. Upon entering into such contract of purchase the said defendant paid a small portion of the purchase money agreed to be paid for the said lands, and was let into possession of the said lands, and

remained in such possession until the sale and transfer by him to John Smith hereinafter mentioned.

3. By a deed poll of the said defendant bearing date in the month of December, 1853, he, the said defendant, for a valuable consideration, bargained, sold, and transferred all his right, title, and interest in and to the said lands, unto one John Smith, who was forthwith let into possession of the said lands and remained in possession thereof until the transfer by him to your complainant hereinafter mentioned, he, the said John Smith, having, whilst he was in possession of the said lands made valuable improvements thereon.

4. By a certain deed poll of the said John Smith, bearing date the thirtieth day of January, 1854, he, the said John Smith, for the valuable consideration therein named of one hundred pounds, bargained, sold, assigned, and transferred the said lands unto your complainant, who was thereupon let into possession of the said lands, and has ever since remained and still is in such possession.

5. Your complainant, after he so obtained the said transfer of the said lands, and on the 4th day of June, 1857, paid the proper officer of the Crown the sum of sixty-one pounds thirteen shillings and three pence, being the residue of the purchase money originally agreed to be paid for the said lands by the said defendant, and your complainant obtained the usual receipt therefor and requested that letters patent granting the said land to your complainant might issue.

6. On the eleventh day of December, 1858, letters patent granting the said lands to the said defendant were issued, but by the direction of the Commissioner of Crown Lands the said patent was delivered to your complainant who still retains the same in his possession.

7. The Commissioner of Crown Lands, although payment of the greater part of the purchase money had been made by your complainant, refused to grant the said lands to your complainant, because the transfers thereof, hereinbefore mentioned, had not in pursuance of the regulations of the Crown Lands Department been registered in the books of that department, but the said commis-

sioner directed the said patent to be delivered to your complainant as the real purchaser of the said lands, and to facilitate your complainant's proceedings in obtaining from the said defendant a proper conveyance thereof.

8. The said letters patent would not have been issued had not the said residue of purchase money been paid by your complainant.

9. Your complainant whilst he has been in the occupation of the said lands, has by a great expenditure of money made large and valuable improvements thereon, and such expenditure has been made with the acquiescence of the said defendant, who was well aware of the same, and never in any way objected thereto, or interfered with your complainant's quiet enjoyment of the said lands.

10. Your complainant, since the issuing of the said letters patent, has applied to the said defendant to convey the said lands to your complainant, but the said defendant has refused to do so, insisting on having under the said patent a title to the said lands, paramount to that of your complainant; and your complainant is apprehensive that the said defendant having the legal title under the said letters patent, will, as he threatens to do, bring an action of ejectment against your complainant, to turn your complainant out of the possession of the said lands.

11. Your complainant charges that the said defendant is a trustee of the said lands for your complainant, and that your complainant is entitled to call for a conveyance of the legal estate therein.

1. Your complainant therefore prays that the said defendant may be declared to be such trustee for your complainant as aforesaid, and that he may be directed by the order and decree of this honorable court to convey the same to your complainant.

2. That the said defendant may be restrained from bringing any action of ejectment, or taking any other proceedings at law in respect of his legal title to the said lands, to the prejudice of your complainant.

3. And that the said defendant may be ordered to pay the costs of this suit; and that for the purposes aforesaid all proper directions may be given; and that your

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[FORM OF BILL TO REMOVE CLOUD, OR FORGED DEED FROM TITLE.]

complainant may have such further and other relief as may seem meet.

And your complainant will ever pray, &c.

Bill to remove cloud, or forged deed from title.

1. By letters patent, bearing date the twenty-ninth day of October, 1844, Her Majesty granted unto your complainant in fee, lot number —, in the — concession west of Hurontario street, in the township of Toronto, in the county of Peel.

2. Your complainant has ever since the said grant continued to be and now is seised in fee of the said land, and your complainant has never made any conveyance thereof, or executed any instrument in any way affecting his title thereto.

3. Sometime in or about the month of December, 1858, the above named defendant forged a certain paper writing, purporting to bear date the 8th day of December, 1858, and to be an indenture made between your complainant of the one part, and the said defendant of the other part, and which purported to be a conveyance by your complainant unto the said defendant in fee of the said land.

4. The said defendant caused the said forged instrument to be registered in the registry office of the county of Peel, and the same now appears in the books of registry of the said registry office, and is a cloud upon the said title of your complainant of the said land.

5. The said defendant is now a prisoner in the provincial Penitentiary at Kingston, under sentence of imprisonment passed upon his conviction of another forgery.

1. Your complainant therefore prays that the said false instrument may be declared to be a forgery, and to be a cloud upon the title of your complainant.

2. And that the same may be ordered to be delivered up to be cancelled, and that the registration and the registered memorial thereof may in like manner be ordered to be cancelled, and that for the purposes aforesaid all proper directions may be given.

3. And that your complainant may have such further and other relief as to your lordships may seem meet.

And your complainant will ever pray, &c.

[FORM OF BILL FOR SPECIFIC PERFORMANCE OF AN AGREEMENT OR FORECLOSURE.]

Bill for specific performance of an agreement for purchase of land, or in default foreclosure.

1. That by an agreement in writing bearing date ——— and signed by ——— the above named defendant, the said ——— contracted to buy of your complainant for the sum of ——— certain freehold property therein described or referred to, being (*description*).

2. The said defendant accepted the title of your complainant to the said lands, and he was at the said date of the said agreement let into possession of the said lands, and has ever since continued and now is in such possession and in the receipt of the rents and profits thereof.

3. Your complainant has received a portion only of the purchase money mentioned in the said agreement, and there is now justly due to your complainant in respect thereof the sum of ——— together with interest since ———.

4. Your complainant has made or caused to be made to the said defendant, an application specifically to perform the said agreement on his part, but he has not done so.

Your complainant therefore prays :

1. That it may be declared that your complainant's title to the said lands was accepted by the said defendant.

2. That an account may be taken of the amount due to your complainant for principal and interest under and by virtue of the said agreement, and that the said defendant may be ordered to pay your complainant the amount so to be found due, together with the costs of this suit, your complainant being ready and hereby offering to perform the said agreement specifically on his part.

3. And in default of such payment that the said agreement may be rescinded, and the interest of the said defendant in the said lands foreclosed.

4. And for that purpose that all proper directions may be given and accounts taken, and that your complainant may have such further and other relief in the premises as to your lordships shall seem meet.

And your complainant will ever pray, &c.

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[FORM OF BILL TO DECLARE ABSOLUTE DEED INTENDED BY WAY OF SECURITY ONLY.]

Bill to declare absolute deed to have been intended by way of security only, and for redemption.

1. For several years prior to and at the date of the indenture of bargain and sale next hereinafter mentioned, your complainant was seised in fee simple of or otherwise well entitled to lot number one, in the first concession of the township of _____, in the county of _____, and Province of Canada, containing by admeasurement two hundred acres of land, more or less.

2. Shortly before the date of the said indenture your complainant being in want of money applied to the said defendant to advance to him the sum of £100 on the security of the said land, and it was agreed by and between your complainant and the said defendant that the said defendant should advance to your complainant the said sum of £100, and that your complainant should convey the said land to the said defendant as security for the re-payment of the same, with interest thereon at the rate of six per centum per annum.

3. Accordingly in pursuance of the said agreement, on the _____ day of _____ in the year, &c., the said defendant paid to your complainant the said sum of £100, and your complainant thereupon by indenture dated and executed on the said last mentioned date, and made between your complainant of the one part and the said defendant of the other part, conveyed the said land to the said defendant absolutely in fee simple.

4. The said indenture, though absolute in form, was intended by your complainant, and it was expressly understood between your complainant and the said defendant that it should stand only as a security for the re-payment of the said sum of £100 and interest thereon at the rate of six per centum per annum from the date of the said indenture, and that upon such re-payment the said defendant should re-convey the said land to your complainant free from all incumbrances.

5. Your complainant has, since the date of the said indenture, continuously been, and he now is, in possession and actual occupation of the said land, and he has dealt with and used the same in all respects as the absolute owner thereof.

6. Your complainant has paid divers sums of money to the said

[FORM OF BILL TO DECLARE ABSOLUTE DEED INTENDED BY WAY OF SECURITY ONLY.]

defendant in account of the said sum of £100 and interest, and there is now due in respect thereof to the said defendant the sum of —, or thereabouts.

7. The said defendant professes and pretends that the said indenture was not intended merely as security, and he claims, or pretends to claim, an absolute title to the said land thereunder, and he has lately, to wit, on the — day of —, commenced an action of ejectment against your complainant in Her Majesty's Court of Queen's Bench for Upper Canada, for the purpose of obtaining possession of the said land.

8. Shortly after your complainant was served with the writ in the said action of ejectment, he tendered to the said defendant the sum of £—, being the amount due at the date of the said tender to the said defendant in respect of the said sum of £100, and interest as aforesaid, and of the costs of the said action of ejectment, but the said defendant refused to accept the same, and he is still proceeding with his said action of ejectment, and he intends to and will, unless restrained by this honourable court, turn your complainant out of the possession of the said land.

9. Your complainant, moreover, is apprehensive that the said defendant will, unless restrained by this honourable court, convey the said land to a purchaser for valuable consideration, without notice, or otherwise incumber the said lands, and that the rights and remedies of your complainant in the premises will be thereby endangered, if not altogether destroyed.

10. Your complainant therefore prays:

1. That it may be declared that the indenture hereinafore mentioned, though absolute in form, was intended by way of security only for the re-payment of the sum of £100 and interest thereon at the rate of six per centum per annum from the date of the said indenture, and that your complainant is entitled to redeem the said land on payment of the amount due in respect of the said last mentioned sum and interest, and the costs of the said action of ejectment up to the date of the said tender.

*Prelims
seq. supra*

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2. That an account may be taken of the amount due in respect of the said last mentioned sums, and that your complainant's costs of this suit as taxed, and of the said action of ejectment after the date of the said tender may be set off against the amount so to be found due, and that on payment of the balance the said defendant may be ordered to re-convey the said land, free and clear of all incumbrances created by him, and deliver up all deeds and writings in his custody or power relating thereto, upon oath, to your complainant, or to whom he may appoint.

3. And that in the meantime, the said defendant, his attorneys, solicitors and agents, may be restrained by the order and injunction of this honorable court, (for which writ your complainant prays,) from further prosecuting his said action of ejectment, and from instituting any other action or proceeding for the purpose of ejecting your complainant from the said land, and from conveying away or incumbering the said land in any way whatever.

4. Further relief, &c.

DEMURRERS.

Preliminary observations.—See Order XI. of the Orders of June, 1853, pp. 54, et seq. *supra*.

Where a defendant is not concerned in the whole of a suit, and the part in which he is concerned can properly be separated from the rest he can object to the bill as multifarious, not however where the parts of a suit follow one another, and the part in which the objecting defendant is interested must be disposed of before the other part can be entered on. (Gillespie v. Grover, 3 Grant, 558.)

Full title of cause.

Commencement.

The demurrer of ——— defendant to the bill of complaint (g) of ——— the above named plaintiff.

(g) If the bill has been amended after a former demurrer say "to the amended bill of complaint, &c." (Smith v. Bryon, 3 Mad. 428.)

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer sheweth, that, &c.

Conclusion.

Wherefore, and for divers other imperfections and good causes of demurrer appearing in the said bill, this defendant doth demur thereto, and prays the judgment of this honourable court whether he shall be compelled to make any answer to the said bill, and prays to be hence dismissed with his reasonable costs and charges in this behalf sustained.

Demurrer for want of equity.

That the plaintiff hath not, in and by his said bill, made or stated such a case as entitles him in a Court of Equity to any relief as against this defendant, as to the matters contained in the said bill, or any of such matters. Wherefore, &c.

Another form.

That it appears by the plaintiff's own showing by the said bill, that he is not entitled to the discovery or relief prayed by the bill against this defendant, (or these defendants or either of them.) Wherefore, &c.

Another form.

That the said bill doth not contain sufficient (or any) matter of equity whereon this court can ground any decree in favour of the said plaintiff, or give the plaintiff any relief against this defendant. Wherefore, &c.

Demurrer for want of parties.

And for (further) cause of demurrer shews that it appears by the said bill that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto. And in

particular it appears by the said bill that A. B., in the said bill named, bought to have been made, and is a necessary party to the said bill, but that he is not made a party thereto. Wherefore, &c.

Demurrer for multifariousness.

That it appears by the said bill that the same is exhibited against this defendant and the several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious. Wherefore, &c.

Another form.

That the said bill is exhibited against this defendant and against several other defendants to the said bill, for several and distinct and independent matters and causes which have no relation to each other, and in which, or in the greater part of which, this defendant is in no way interested or concerned, and ought not to be implicated. Wherefore, &c.

Demurrer of the Statute of Frauds.

That it appears by the said bill, that neither the promise or contract which is alleged by the said bill, and of which the plaintiff, by the said bill, seeks to have the benefit, nor any memorandum or note thereof, was ever reduced into writing or signed by this defendant, or any person lawfully authorised thereunto within the meaning of the Statute of Frauds. Wherefore, &c.

ANSWERS.

Preliminary observations.—In preparing the answer of an infant, it is material to bear in mind that the common answer will not be sufficient to enable him to make any affirmative case. If his case rests on grounds not disclosed by the plaintiff's bill, they must be stated in the answer. (Powys v. Mansfield, 6 Sim. 565; Holden v. Hearn, 1 Bea. 445, 455; Lane v. Hardwicke, 9 Bea. 148.)

If a defendant does not insist by his answer upon the benefit of the Statute of Frauds; he cannot avail himself of its provisions at the hearing, although he denies the agreement set up by the bill. (Clifford v. Turrell, 1 Y. & C. C. 138; Baskett v. Caffé, 4 DeG. & S. 388.)



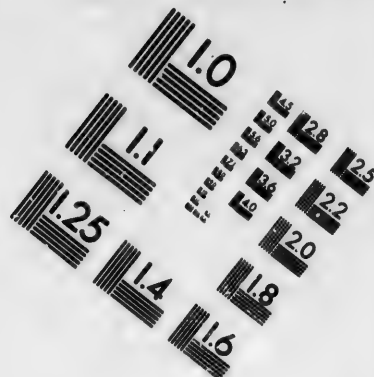
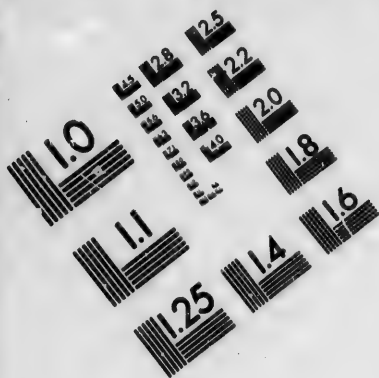
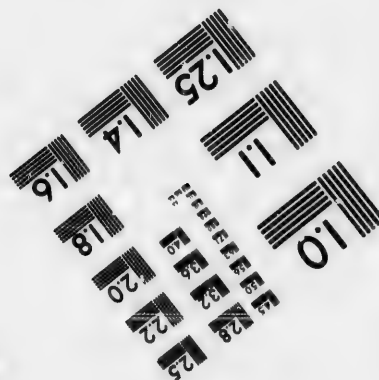
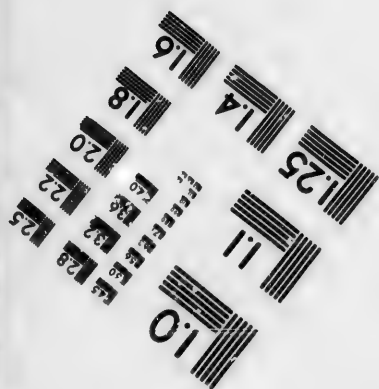
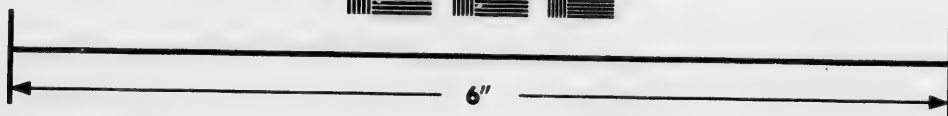
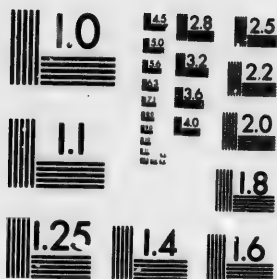


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As to the Statute of Limitations as a defence, see *Holding v. Barton*, 1 Sm. & G. App. xxv.

As to the general nature of answers and the practice thereon, see Order XII., sec. 1-5, pp. 57 *et seq.*

The answer must be in the first person, and divided into paragraphs, numbered consecutively, each paragraph containing as nearly as may be a separate and distinct allegation. See *supra* page 260.

An answer is a full defence as to both law and fact; and therefore every objection which may be taken by demurrer, may also be taken by way of answer. The pleader, when an objection of this character is taken by answer, should crave that the defendant may have the same benefit as if he had demurred. This double mode of pleading is advisable only in those cases in which the question whether the bill is demurrable is a doubtful one, and where the defendant is advised that his substantial defence is on the merits.

Form of answers.

IN CHANCERY,

Between

John Smith,

Plaintiff,

and

John Styles,

and John Roe,

Defendants.

The answer (*h*) of John Styles, (*i*) one of the above named defendants, (*or* the above named defendants, *as the case may be*), to the bill of complaint, (*or* amended bill of complaint,) (*k*) of the above named plaintiff. (*l*)

In answer to the said bill, I, the said John Styles, say as follows:—

(*h*) If the answer be a supplemental one commence, "The supplemental answer of —."

(*i*) If the defendant is misnamed in the bill the answer should commence, "The answer of C. D. in the bill by mistake called D. D. one of, &c."

(*k*) If the defendant has not personally answered the *original* bill, the term "amended" should not be used. (*Rigby v. Rigby*, 9 Beav. 311.) If the bill be amended a second time and the defendant puts in a third answer it should be to the "secondly amended bill of complaint."

(*l*) Where the plaintiff is an infant, lunatic, or married woman suing by next friend or committee, &c., it should be so stated as "to the bill of complaint of the above named plaintiff, A. B., *an infant* by —, his next friend," or "A. B., the wife of —, by —, her next friend," as the case may be.

Answer of an infant. (m)

The answer of *Ann Smith*, one of the above named defendants, an infant under the age of twenty-one years, by *John Roe*, her guardian. In answer to the said bill, I, *Ann Smith*, by *John Roe*, my guardian, say as follows:—

I am an infant under the age of twenty-one years, that is to say, of the age of — years, and I submit my rights and interest in the matters in question in this cause to the care and protection of this honourable court.

Answer of lunatic and his committee.

The joint and several answer of *John Smith*, a lunatic, by *John Roe*, his (guardian and) committee, and the said *John Roe*, two of the above named defendants, to the bill of complaint of the above named plaintiff.

Jurats to answers.

The form of the usual jurat, and that for an illiterate person (*n*) will be found, *supra* pp. 58, 59.

In the case of an illiterate person where the answer is read over by the commissioner, the jurat may be in the following form:

The defendant, C. D., on the — day of —, appeared before me at my chambers in — and not being able to read or write, the foregoing answer was read over by me to the said

(*m*) An infant, answers by guardian, and a lunatic, so found by inquisition, by his committee. A married woman, answering in respect of an interest vested in her husband in her right, answers jointly with him, and it is in effect the answer of her husband. But if she answer in respect of her separate estate, or if for any reason she answers separately, she answers in her own name. See Order XII., sec. 1, pp. 61, 62, *supra*.

An order must be obtained for a married woman to answer separately from her husband. See Order XII., sec. 1, page 61, *supra*.

(*n*) If the commissioner does not read over the answer the mark should be attested by the witness, and the witness should be first sworn that he had truly and faithfully read the contents of the answer to the defendant, and that he saw him make his mark thereto. (*Wilton v. Clifton*, 2 Hare, 535.) It will not vitiate the jurat should it omit to state that the defendant appeared perfectly to understand the answer. (*Ibid.*)

defendant, who appeared perfectly to understand the same, and made his mark thereto in my presence, and the said defendant was thereupon sworn before me that the same was true of his own knowledge, except as to matters which are therein stated to be on his information, and as to those matters he believed it to be true.

Jurat to answer of married women.

The defendant C. D., on the ——— day of ———, appeared before me at my chambers in ———, and signed the foregoing answer in my presence, and was thereupon sworn before me pursuant to an order dated the ——— day of ———, whereby she is at liberty to answer separate from her husband, that she had read the said answer, &c.

Jurat to answer of guardian of infant. (o)

A. B., guardian of the infant defendant C. D., assigned pursuant to an order dated the ——— day of ———, appeared before me at my chambers in ———, and signed the foregoing answer in my presence, and was thereupon sworn before me that he had read the said answer and knew the contents thereof, and that he believed it to be true.

Affirmation to Quaker's answer.

The defendant C. D., on the ——— day of ———, appeared before me at my chambers in ———, and signed the foregoing answer in my presence, and thereupon affirmed before me that he had read the said answer, &c.

Jurat to joint answer.

The defendants C. D. and E. F., on the ——— day of ———,

(o) The following is the oath administered to the guardian where the infant answers jointly with others. "You do swear that so much of this answer of the infant defendant as concerns the said infant you believe to be true. So help you God."

If the guardian be a co-defendant he should sign twice, once for himself and a second time as "guardian of the above named infant, C. D.," and in such case two oaths should be administered, one as defendant, the other as guardian, and the jurat will be altered accordingly. (1 Smith Ch. Pr., 7th ed. 485.)

appeared, &c., and were thereupon severally sworn before me that they had read the said answer, &c.

Corporations.

The answer of a corporation is taken under their corporate seal, which is affixed at the bottom of the answer and near it is written "Sealed with the common seal of, &c., this ——— day of ——— &c."

A. B., President, or other head officer of the company.

NOTICES OF MOTIONS. (P)

Full title of cause.

Commencement of notice of motion to the court.

Take notice that this honourable court will be moved on Monday the ——— day of ——— A.D., 186—, at the hour of ten of the clock in the forenoon, or at such other hour as the court may sit or counsel can be heard for and on behalf of the above named plaintiff for an order that, &c.

Conclusion.

And take notice that in support of such motion will be read the affidavits of (*stating them*) this day filed, and the exhibits

(P) The practitioner will find full information as to motions in pages 89, *et seq.*, and 176, *et seq.*, *supra*.

Care should be taken to express in the notice when leave of the court has been obtained authorising it to be given, thus: "By special leave of the court for this purpose obtained this day." For if notice be given by leave, the leave must be stated in the notice of motion. (*Hill v. Remell*, 2 M. & Cr. 641.) As to short notice of motion. (*Hart v. Tulk*, 6 Hare. 611.) Leave may be given to serve a notice of motion for an injunction with the bill, but not before the bill is filed. (*Simmons v. Heaviside*, 22 Bea. 412.)

The notice of motion must state the names of the parties to it fully and correctly. (*Davis v. Barrett*, 7 Bea. 171; *Rowlatt v. Battell*, 2 Hare, 186; *Pollard v. Doyle*, 2 W. R. 509.) And it must state distinctly what the party moving wishes to obtain by his motion. (*Daniell's Chan. P.*, 3rd ed., 1196.) The misnomer of a party in the affidavit of service will be a ground for discharging the order made thereon (*Salomon v. Stalman*, 4 Bea. 243.)

Notice of motion to discharge an order for irregularity must state the irregularity complained of.

[COMMENCEMENT OF MOTION IN CHAMBERS.—CONCLUSION.—FORMS OF MOTIONS.]

therein referred to (*if so*) and the pleadings and other proceedings in this cause. Dated this ——— day of ———, A.D. 186—.

Yours, &c.,

A. B.,

Plaintiff's Solicitors.

To the above named defendant, and to ——— his solicitors.

Commencement of motion in chambers.

Take notice that this honourable court will be moved before the presiding judge in chambers on Tuesday the ——— day of ——— A.D., 186—, at the hour of ten of the clock in the forenoon, or at such other hour as chambers may be held for and on behalf of the above named ——— for an order that, &c.

Conclusion.

And take notice that in support of such application will be read the affidavit of (*stating*) this day filed and the exhibits therein referred to (*if so*) and the pleadings and other proceedings in this cause. Dated, &c.

Motion for leave to enlarge time for filing affidavit under four-day order for production.

That the time within which the said defendant is to file an affidavit, and produce and leave with the registrar under the plaintiff's order for production obtained in this cause, and dated the ——— day of ———, may be enlarged until the ——— day of ——— next, and that the costs of this application may be costs in the cause. (*Mention affidavit to be used in support of application.*)

Motion for time to answer.

That he may have ——— further time to answer or demur, not demurring alone to the plaintiff's bill.

Motion to open biddings.

That the premises being lot No. 1 in the 1st concession of the township of York, in the county of ———, being part of the premises directed by the decree (*or order*) in this cause, bearing date

the ——— day of ———, to be sold, may be re-sold, the said ——— hereby proposing and submitting to give £ ——— for the same, being ——— more than was bid for the said lot at the former sale. (*Mention what is to be read in support of the application.*)

For an injunction to stay proceedings at law. (q)

That the defendant ——— may be restrained from commencing or prosecuting any action or other proceeding at law against the plaintiff for the recovery of the sum of £ ———, in the plaintiff's bill mentioned, or for or in respect of the matters mentioned in the plaintiff's bill, or any of them, until the further order of this court.

For the appointment of a receiver.

That some proper person may be appointed a receiver of the rents and profits of the estates in the pleadings in this cause mentioned with the usual directions.

For an injunction to stay waste.

That the defendant ——— and his agents, workmen and servants, may be restrained from (*following the prayer of the bill*) until the hearing of this cause or further order of this court.

To dismiss bill for want of prosecution. (r)

That the bill filed in this cause may stand dismissed out of court, with costs to be taxed by the master of this court for want of prosecution.

To amend bill.

That the plaintiff may be at liberty to amend his bill of com-

(q) In order to obtain an injunction for stay of proceedings at law, an application must be made to the court upon affidavit, verifying the facts alleged in the bill. The application may be made *ex parte*. Leave should also be obtained, if necessary, to serve the notice of motion and copy of the bill upon the attorney for the plaintiff at law. For practice hereon see Order XXVII., sec. 1, page 119, and cases there cited.

(r) For practice as to dismissal of bill for want of prosecution, see Order XXIV., sec. 1, page 114, and notes and cases thereon.

Where an infant sues by next friend, the notice should be *by the infant by his next friend*, and not by the next friend merely. (*Pidduck v. Boulton*, 2 Sim. N. S. 238.)

plaint herein, in the following particulars, to wit: (*Here state the required amendment.*) And take notice, &c.

To take bill pro confesso.

That the plaintiff may be at liberty forthwith to set this cause down to be heard, in order that his bill of complaint may be taken pro confesso against the said defendant. And take notice, &c.

To enlarge time for payment of mortgage money.

That upon the said defendant, A. B., paying unto the plaintiff, C. D., on or before the — day of —, (*the day appointed for payment,*) the sum of £—, found due to the said plaintiff for interest and costs on his mortgage security in question in this cause, the time appointed for the said defendant to redeem herein may be enlarged for a period of — months, or for such other period as the court may direct. And take notice, &c.

That a purchaser may be ordered to pay his purchase money into court.

That A. B., who has been declared the purchaser at the sum of £—, of the premises comprised in lot —, of the premises in question in this cause, as mentioned in the report confirming the sale herein, may be ordered on or before the — day of — next, to pay into court, with the privity of the registrar of this court, to the credit of this cause, the said sum of £—, and interest thereon, at the rate of six per centum per annum from the — day of — to the day of payment, the amount thereof to be verified by affidavit, and that the said A. B. may be ordered to pay the costs of this application. And take notice, &c.

To assign guardian.

That —, of the (*city*) of (*Toronto,*) in the county of (*York,*) Esquire, one of the solicitors of this honourable court, may be assigned guardian *ad litem* to the above named infant defendant, A. B., by whom he may answer the bill in this cause, and defend this suit. And take notice, &c.

For security for costs.

That the plaintiff do procure some sufficient person or persons, resident within the jurisdiction of this court, to give security on his behalf in the penal sum of not less than ——— pounds, to answer the costs of the said defendant, in case this court shall think fit to award any before the said defendant shall be obliged to put in his answer to the bill in this cause, and that in the meantime all proceedings herein may be stayed. And take notice, &c.

For an order nisi to dismiss bill on default in giving security.

That the plaintiff do within fourteen days from the date of such order, procure some sufficient person or persons, resident within the jurisdiction of this court, to give security on his behalf, pursuant to an order made herein, bearing date the ——— day of ———, and in default thereof, that the bill of complaint of the said plaintiff do stand dismissed out of this honourable court as against the said defendant, with costs to be taxed to the said defendant, and paid by the said plaintiff forthwith thereafter. And take notice, that in support of such application will be read the said order, bearing date the ——— day of ———, and an affidavit (or admission) of service thereof, and also the certificate of the (deputy) registrar of this court (at ———.)

Notice of motion for decree.

That (recite the prayer of the bill or so much as may be necessary) or for such other decree as the nature of the case may require, and as this honorable court may think the plaintiff entitled to. And take notice, &c.

For order for substitutional service on attorney-at-law.

That service of an office copy of the bill in this cause with the endorsement required by the General Orders of this court upon A.B., the attorney-at-law of the above-named defendant C. D., may be deemed good service on the said defendant. And take notice, &c.

To discharge receiver on payment of money into court.

That A. B., the receiver appointed in this cause may be discharged,

and that he may pass his accounts before the master of this court at ———, and pay the balance thereof into court to the credit of this cause subject to the further order of this court, and that upon payment of the said balance into court as aforesaid, the recognizance (or bond) filed herein, dated the ——— day of ———, entered into by the said A. B., together with C. D. and E. F., his sureties, may be vacated. And take notice, &c.

For special injunction.

That an injunction may be awarded against the defendant A. B., to restrain him, his agents, servants, and workmen, from (*recite so much of the prayer of the bill as relates to the injunction*) until the hearing of this cause or until the further order of this court. And take notice, &c.

For injunction to stay cutting of timber.

That an injunction may be awarded to restrain the above-named defendant A. B., his servants, workmen, and agents, from cutting down or removing any timber and other trees now standing, growing, and being upon lot number ———, in the ——— concession of, &c. And take notice, &c.

To dissolve injunction.

That the injunction awarded in this cause against the said A. B., his servants, workmen, and agents, (*or as the case may be,*) to restrain the said A. B., (*here follow the injunction,*) may be dissolved.

NOTICES GENERALLY.

Of filing answer.

Short title of cause.

Take notice that the answer of the defendant A. B., (*or the joint answer of the defendants A. B. & C. D.,*) to the plaintiff's (*amended*) bill in this cause has been this day filed.

Dated this ——— day of ———, A.D. 1863.

To E. F.,	}	G. H.,
Plaintiff's Solicitor.	}	Solicitor for the said defendants.

Of filing replication.

Take notice, that the plaintiff has this day filed his replication herein in the following form, to wit., (*here copy replication.*)

Dated this _____ day of _____, A.D. 1863.

To the defendant A.B., } E. F.,
and to C. D. his Solicitor. } Plaintiff's Solicitor.

To admit documents.

Take notice that, that the plaintiffs propose to adduce in evidence in this cause the several documents hereinafter mentioned, which said documents have been inspected by you (s) and that you are required to admit that such of the said documents as are specified to be originals were respectively made and executed as they purport respectively to have been, that such as are specified as copies are true copies, and that such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered, respectively, saving all just exceptions as to the admissibility of all such documents as evidence in this cause; or to make such other admission as you can in respect of the said documents within four days from the date hereof.

Dated this _____ day of _____, A.D. 1863.

A. B., Solicitor for plaintiffs.

(*Here set out documents.*)

To produce documents at the examination of witnesses and hearing.

Take notice, that you are hereby required to produce at the examination of witnesses in this cause, at the _____ of _____ on Tuesday the _____ day of _____ 1863, or whenever the said examination shall take place, and also at the hearing of this cause, the following documents, viz., (*set out documents which are specially required to be produced,*) and all deeds, books, papers, writings and documents, whatever in your custody or power relating to the matters in question in this cause.

(s) If the documents have not been inspected by the opposite party, say "which said documents may be inspected by the defendant, his solicitor or agent, at the office of _____ in _____ between the hours of _____ on the _____ day of _____, A. D. 1863."

To settle minutes of (or to pass) decree or order.

Take notice that the registrar will settle the minutes of (or will pass) the decree (or order) herein to-morrow, at ——— of the clock in the ——— noon, at his chambers at Osgoode Hall, in the city of Toronto.

Dated this ——— day of ———, A.D. 1863.

A. B., Solicitor.

AFFIDAVITS.

Preliminary observations.—An affidavit must be entitled in the full style of the cause, and must contain the Christian and surname, (in full without any initials,) the place of residence, description and addition of the deponent. The place of residence of a party to the cause need not be particularly described, if it is stated that he is "the above named plaintiff," or "the above named defendant," or "one of the above named defendants" in the cause. It must be expressed in the first person, divided into paragraphs, numbered consecutively. An affidavit should not be argumentative. It must show the means of knowledge of the person making it, and when made upon information, what is the source of such information. See Order XL., sec. 5, *supra*, p. 179, and the Orders of the 18th of April, 1859, and the 10th day of July, 1861. An affidavit should be written in words at length, and if any erasures or interlineations should occur, the commissioner before whom it is sworn should set his initials in the margin over against such erasures or interlineations before administering the oath.

If any document is referred to in the affidavit it should be impressed with some letter or other mark distinctly connecting it with and corresponding to the letter or mark mentioned in the affidavit, and thus be made an exhibit. This exhibit should be endorsed as follows:

"In Chancery. (*Short title of cause.*) This is the paper-writing, or exhibit marked with the letter —, referred to in the affidavit of —, which was produced and shewn to him at the time of swearing his affidavit in this cause. Sworn before me this — day of —. A Commissioner, &c."

Affidavits, except upon *ex parte* applications, must be filed before they can be used in evidence, and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion. Generally as to affidavits see Order XL., secs. 5 and 6, page 179, and notes.

An affidavit of the service of a bill need not shew that the person served was an infant or otherwise under disability. *Sherwood v. Rivers*, (2 Y. & C. C. C. 166; 7 Jur. 78; *Welch v. Welch*, 1 Hare, 598; 6 Jur. 599;) but it must in all cases shew the mode in which the service was effected. (*Haigh v. Dixon*, 1 Y. & C. C. C. 180.)

Affidavits of the service of orders and writs should shew that the original was produced and that the copy served was duly endorsed with the notice required by sec. 6, of Order XLVI., in cases where the endorsement is necessary. (See *Thomas v. Gwynn*, 5 L. T. 327, which was the case of service of an order upon an infant.)

An affidavit in a suit will not be received if sworn before a solicitor of any party to the suit, (*In re Hogan*, 3 Atk. 512; *Wood v. Harpur*, 3 Bea. 290,) or before a clerk of such solicitor. (*Wood v. Harpur*, 3 Bea. 290.)

See further as to affidavits *supra*, pp. 179, 180, 181.

FORMS OF PROCEEDINGS.
[AFFIDAVITS.—COMMENCEMENT.—JURATS.]

345

A witness may be cross-examined on affidavits made by him on interlocutory applications under sec. 7 of Order XL., *supra*. (Lloyd v. Whitty, 19 Beav. 57.)

Where the object for which an affidavit was used has been attained (*e. g.* obtaining an order to amend) cross-examination thereon will not be allowed, as it could not afford any ground for rescinding the order and would consequently have no object or purpose. (The Catholic Publishing Co. v. Wyman, 7 L. T. N. S. 849; 11 W. R. 899.)

Commencement.

IN CHANCERY,

Between

A. B.,

Plaintiff.

AND

C. D.,

Defendant.

I, *John Smith*, of, &c., (place of residence, and description or addition,) or I, *John Smith*, the above named plaintiff (or one of the above named defendants) make oath and say, as follows: (or if more than one deponent,) we A. B., of, &c., and C. D., of, &c., severally make oath and say as follows: (t)

1. I, the deponent, A. B., say, &c.

2. I, the deponent, C. D., say, &c.

The facts and circumstances deposed to by me in the — paragraphs of this affidavit are true and within my own personal knowledge. The facts and circumstances deposed to by me in the — paragraphs of this affidavit are believed by me to be true from information which I have received from —.

Jurats to affidavits.

The ordinary jurat will be found at page 180 *supra*.

To affidavit of illiterate person.

Sworn before me at —, in the county of —, on the — day of —, 1863, the whole of the above affidavit having been first read over to the deponent A. B., who appeared perfectly to understand the same, and made his mark thereto in my presence, and

(t) An affidavit instead of being headed "We A. B., C. D. and E. F. severally make oath and say," was headed "The joint and several affidavit of A. B., C. D. and E. F. We the said A. B., C. D. and E. F. say as follows." Leave to file it was refused. (*In re Newton*, 4 DeG. F. & J. 3.)

whom I informed that he was liable to cross-examination as to its contents, and that he was at liberty to add to or vary the same. (u)

If the deponent is a Quaker, or other person having conscientious objections to taking an oath, the jurat should be as follows :

Affirmed before me, at —, in the county of —, on the — day of —, 1863, having been first read over, &c., as at p. 180, *supra*.

To joint affidavit.

Sworn by the deponents A. B., C. D. and E. F. at —, in the county of —, on the — day of —, 1863, having been first read over to the said deponents A. B., C. D. and E. F., &c., as at p. 180 *supra*.

Affidavit of service of an order (or decree) requiring an act to be done thereby.

I did on the — day of —, personally serve —, the above named defendant, with the order (or decree) made in this cause and dated the — day of —, now produced and shewn to me at the time of swearing this my affidavit marked with the letter A, by delivering unto and leaving with the said defendant at — a true copy of the said order, (or decree,) and at the same time producing and shewing unto the said defendant —, the said original order (or decree) duly passed and entered, and on which copy, when so served, was endorsed the words following (that is to say) : " If you, the within named —, neglect to obey this order (or decree) by the time therein limited, you will be liable to be arrested by the sheriff; and you will also be liable to have your estate sequestered for the purpose of compelling you to obey the same order (or decree) without further notice." (v)

(u) The affidavit should be read by the commissioner, or if it has been read by another person such other person should be sworn that he has truly, distinctly, and audibly read over the whole of the affidavit to the deponent.

(v) See Order XLVI., sec. 6, page 235, *et seq.*

As to an order for substituted service see *Roby v. Scholes*, 20 L. T. 231.

Affidavit of service of a notice of motion.

I, *John Smith*, of, &c., make oath and say as follows :

That I did on the — day of —, serve (personally) the above named — with a notice in writing purporting that this honourable court would be moved (*here set forth the notice*) by delivering to and leaving with the said —, at, &c., a true copy of such notice, (*if served on solicitor then say Mr. —, who is the solicitor of the above named — (or Mr. — and Mr. —, who are solicitors respectively for the above named — and —) with a notice in writing purporting that this honorable court would be moved (here set forth the notice) by delivering to and leaving with a clerk of the said Mr. —, at his office in the city of Toronto, a true copy of such notice.*

Affidavit in support of motion to amend bill under sec. 14, of Order IX.

1. That counsel has advised that the bill filed in this cause on the — day of — last, should be amended.
2. That the draft of the proposed amendments has been settled and approved and signed by counsel.
3. That such amendment is not intended for the purpose of delay or vexation, but because the same is considered material for the case of the said plaintiff.
4. That the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the said bill, for we say (*here state the special facts shewing the materiality of the amendments and due diligence.*) (*w*)

Affidavit by creditor in support of motion for decree to administer the estate of a deceased person without bill filed. (See Order XV., supra p. 85 et seq.

In Chancery.

In the matter, &c., (*following the notice of motion.*)

It is not necessary to issue a commission for the purpose of taking the affidavit of service of certain papers on a defendant in a foreign country. (*Snyder v. O'Lone, 4 Grant's Chancery Rep. 148.*)

(*w*) See notes *supra* p. 43 and *seq.*

[AFFIDAVIT BY CREDITOR IN SUPPORT OF ADMINISTRATION ORDER.]

I A. B., of &c., the above named plaintiff (*or in the case of partners one of the above named plaintiffs*) make oath and say as follows :

1. That the above named C. D. was in his life-time, and his estate still is justly and truly indebted to me (and to E. F., my partner in trade) in the sum of —, (*here state the occasion of the indebtedness as, for goods sold and delivered by me (and my said partner) as merchants, to the order and for the use of the said C. D., in his life-time and at his request.*)

2. That the particulars of the charges or items composing the said sum of —, are set forth in the paper writing now produced and shewn to me marked A., and that the charges therein contained are fair and reasonable and such as are customary in the trade of merchants.

3. That I have not (nor hath my said partner) nor any person or persons by my (*or our or either of our*) order, or for my (*or our or either of our*) use, to my knowledge or belief received any security for or on account of the said debt.

4. That the said C. D. died on or about the — day of —, in the year, &c., having by his will bearing date the — day of —, in the year, &c., devised the whole of his real estate unto the above named defendants, and thereby empowered them to sell such real estate, and authorised them to give receipts for the rents and profits thereof and for the produce of the sale of such real estate, and he thereby appointed the said defendants executors of his said will, which was duly proved by them in the Surrogate court of the county of —, on the — day of —, in the year, &c., as I know from the perusal and inspection of a certified copy of the probate of such will.

Like affidavit by legatee, residuary, specific, or pecuniary.

1. That the above named C. D., by his last will and testament, bearing date the — day of —, in the year, &c., amongst other things (*state the legacy to the plaintiff as nearly as possible in the words of the will, e. g., gave and bequeathed unto me the sum of*

one hundred pounds) (x) and he thereby appointed the said defendants executors of his said will.

2. The said C. D. died on or about the — day of —, in the year, &c., without having revoked his said will, and the same was duly proved by the said defendants on the — day of —, in the year, &c., in the Surrogate court of the county of —, as I know from the inspection of a certified copy of the probate of such will.

3. That the said legacy or sum of one hundred pounds (or in the case of a specific legacy name the articles specifically bequeathed) has not (or have not) nor has any part thereof been paid (or handed over) to me or to any person to my order or for my use, to my knowledge or belief.

Like affidavit by next of kin.

1. That the above named C. D. died on or about the — day of —, in the year, &c., intestate.

2. The letters of administration of the goods, chattels and effects, rights and credits (or as the case may be, following the letters) of the said C. D. were, on the — day of —, in the year, &c., granted by the Surrogate court of the county of —, to the above named defendant E. F., as I know from an inspection of a certified copy of the said letters of administration.

3. That the sole next of kin of the said C. D., living at his death, were myself and —.

4. That no part of the personal estate of the said intestate has been paid to or received by me, or to or by any person by my order or for my use, to my knowledge or belief.

Affidavit verifying abstract of title.

1. I say that I have carefully examined and compared the abstract written on — sheets of paper now produced and shewn to me, marked A., with the several deeds and documents thereby

(x) In the case of residuary legatee say: "Gave all his residuary, real, and personal estate to the above named E. F. upon certain trusts for the benefit of myself and of — (state trusts of will shortly to show who is entitled to residue.)"

purported to be abstracted, and that such abstract is a true and correct abstract of the said deeds and documents, so far as such deeds and documents relate to the premises referred to in an order (or decree) made in this cause, (or matter,) bearing date the — day of —, in the year, &c.

Affidavit to prove judgment debt.

1. That the above named defendant, A. B., is now justly and truly indebted to me in the sum of —, under and by virtue of a judgment recovered by me in the Court of Queen's Bench, (or Common Pleas,) for Upper Canada, (or in the County court of the county of —,) for the sum of — damages, and — costs, in an action (of debt), and signed on the — day of —, in the year, &c.

2. That I caused a writ of *fiery facias* against the lands and tenements of the said defendant, A. B., to be issued out of the said court on the said judgment, directed to the sheriff of the county of —, and the said writ was on the — day of —, in the year, &c., placed in the hands of the said sheriff, and the same has ever since been and now is in the hands of the said sheriff in full force and virtue.

3. That I have not, nor hath any person or persons by my order or for my use, to my knowledge or belief, received any security whatsoever for or on account of the said debt, save and except the said judgment and the proceedings thereon.

4. That the said judgment was not signed for a nominal sum, but the said sum of — represents the true debt.

Affidavit by mortgagee to prove mortgage debt.

1. That by the indenture now produced and shewn to me, marked with the letter A, and bearing date the — day of —, in the year, &c., and made between, &c., the premises comprised in the said indenture were conveyed by the said — to me, for securing the sum of £—, together with interest thereon at £— per cent., subject to a proviso for redemption of the said premises on the re-payment of the said sum of £— and interest to me by the said —, on the — day of —, in the year, &c.

2. That I have not, nor hath any person or persons by my order, or to my knowledge or belief, for my use, received the said principal sum of £——, or any part thereof, or the interest which has accrued due thereon since the said —— day of, &c., or any part thereof, or any security or satisfaction whatever for the same, respectively, or any part thereof, save and except the said mortgage. That I have not, nor hath nor have any person or persons by my order, or to my knowledge or belief, for my use, been in the occupation of the premises comprised in the said indenture of mortgage, or any part thereof, nor in the receipt of the rents and profits derived therefrom or from any part thereof. But the whole of the said sum of £——, together with interest thereon at the rate aforesaid, from the said —— day of ——, in the year, &c., still remains justly due and owing to me under and by virtue of the said indenture.

Affidavit of service of a petition.

1. I did, &c., serve Mr. ——, of ——, who is the solicitor in this cause, for (*state whether plaintiff or defendant or for whom else he is solicitor,*) with a petition in this cause (*or matter*) preferred to the honourable the judges of the Court of Chancery, by —— with his lordship's the Chancellor's fiat thereon, bearing date, &c., whereby it was ordered that all parties concerned should attend on the matter of the said petition the —— day of ——, of which notice was to be given forthwith by delivering to and leaving with a clerk of the said Mr. ——, at his office in the city of Toronto, a true copy of the original petition with his lordship's fiat endorsed thereon, and at the same time producing and shewing him the said original petition with his lordship's fiat endorsed thereon.

Affidavit of the execution of a deed by an attesting witness.

1. I was present on the —— day of ——, and saw —— sign, seal and deliver the paper-writing or deed, dated, &c., marked with the letter —— produced and shewn to me at the time of swearing this my affidavit.
2. The name or signature “——” thereto set and subscribed as the party executing the said deed, is of the proper handwriting

of the said —, and the name “—,” set and subscribed as the person witnessing the execution thereof by the said — is of the proper handwriting of me, this deponent.

Affidavit of execution by a person not a witness.

1. I am well acquainted with the hand-writing of the defendant *John Smith*, having often seen him write.

2. The indenture dated, &c., and purporting to be made between the said *John Smith*, &c., produced to me at the time of making this my affidavit, marked with the letter — was, as I believe, duly executed by the said defendant *John Smith*, and the name “*John Smith*,” set and subscribed at the foot of the said indenture, is of the proper handwriting of the defendant *John Smith*.

3. I am also well acquainted with the handwriting of *John Roe*, of, &c., and I say that the name “*Jno. Roe*,” set and subscribed to the said indenture, as the attesting witness to the execution thereof by the said *John Smith*, is of the proper handwriting of the said *John Roe*.

Common affidavit to be annexed to bill in an interpleader suit.

I — the above named plaintiff make oath and say as follows :

1. That the bill in this suit (or, the bill hereunto annexed) is not filed by one in collusion with any or either of the defendants in the said bill named, but such bill is filed by me of my own accord for relief in this honourable court.

Affidavit of a witness being of the age of seventy years, to obtain order to examine him de bene esse.

I, A. B., of &c., solicitor for the above named plaintiff in this cause, make oath and say as follows :

1. That C. D., of &c., is a very material witness for the said plaintiff in this cause, and that he cannot without the evidence of the said C. D., as I am advised and verily believe, safely proceed to a hearing of this cause.

2. The said C. D. is now of the age of seventy years, as I have been informed by him, and verily believe. (y)

(y) See *M’Kenna v. Everitt*, 2 Bea. 189, 191; *Hope v. Hope*, 3 Bea. 317.

Affidavit for an order for a commission to examine witnesses out of the jurisdiction.

1. This cause is now at issue, and I, this deponent, am desirous of proceeding therein.

2. I have several witnesses to examine in support of the case made by my bill (or answer) who now live and reside at — and —, (and particularly *John Smith, John Roe, and John Doe,*) who can, as I believe, prove the truth of the allegations made in the — paragraphs of my bill (or answer.)

3. The several witnesses above named are, as I believe and am advised, material and necessary witnesses for me in this cause, and without their testimony I cannot safely proceed to a hearing; but that with the testimony of those witnesses I am advised and believe I can establish my right to relief in this cause. (or I shall be able to make a good defence to this cause.) (z)

Affidavit of attendance to receive money directed to be paid by a decree and report at a certain time and place.

1. That I did on the — day of —, in the year, &c., under and by virtue of the power of attorney now shewn to me and marked with the letter A, and in pursuance of the master's report made in this cause, bearing date the — day of — last, personally attend and wait at (*insert the place as described in the master's report,*) from before the hour of — of the clock in the — noon until after the hour of — of the clock in the — noon of the same day, being the place and time (or and a portion of the time) mentioned in the said report in order to receive from the above named defendants the sum of —, by the said report found due and directed to be paid to the above named plaintiff for principal, interest and costs in respect of the agreement in question in this cause.

2. At the said time and place the said defendants did not, nor

(z) See *Crofts v. Middleton*, 9 Hare, App. xviii; 22 L. J. Ch. 706; 17 Jur. 112; 1 W. R. 163.

As to stating the names of the witnesses and the facts upon which it is proposed to examine them, *Carbonell v. Bessell*, 5 Sim. 636; *Mendizabel v. Machado*, 2 S. & S. 483; 2 Rus. 540.

did either of them or any one on their or either of their account or behalf, attend to pay or tender to me the said sum of — or any part thereof. (a)

By the plaintiff as to non-payment of money reported due.

1. That I have not, nor, to the best of my knowledge, information and belief, has any person or persons on my account, or behalf, received the sum of — found due and directed to be paid to me on the — day of —, by the master's report made in this cause bearing date the — day of —, or any part thereof, and I say that the said sum of — is still wholly due and unsatisfied. (b)

Affidavit verifying accounts and answering enquiries as to real and personal estate, (see schedule Q, to Order XLIII., sec. 11 of the Orders of June, 1853, supra pp. 212, 213.)

We A. B. and C. D., the above named defendants, severally make oath and say:

1. That we have according to the best of our knowledge, remembrance, information and belief, set forth in the first schedule hereunder written, a full, true, and particular account and inventory of the personal estate of, or to which E. F., deceased, the testator in the pleadings mentioned, was possessed or entitled at the time of his death, and not by him specifically bequeathed.

2. That save what is set forth in the said first schedule, and what is by the said testator specifically bequeathed, the said testator was not, to the best of our knowledge, information and belief, at the time of his death, possessed of or entitled to any debt or sum of money due to him from us or either of us, on any account whatsoever, nor to any leasehold or other personal estate, goods, chattels or effects in possession or reversion, absolutely or contingently, or otherwise howsoever.

(a) As the Order of the 29th June, 1861, only applies to foreclosure and redemption suits, this form is still useful where money, other than mortgage money, is directed to be paid at a specified time and place.

(b) If the plaintiff attends in person to receive the money, an affidavit similar to this and the foregoing may be used *mutatis mutandis*.

3. That the said testator's funeral expenses have been paid, and that the same consist of the item of disbursement numbered one in the account now shewn to us marked A, (or if not paid it should be so stated, with the amount, and to whom due.)

4. That we have in the said account marked A, according to the best of our knowledge, information and belief, set forth a full, true and particular account of the personal estate of the said testator not by him specifically bequeathed, which has come to our hands, or to the hands of any or either of us, or to the hands of any person or persons by our or either of our order, or for our or either of our use, with the times when, the names of the persons from whom, and on what account the same has been received, and also a like account of the disbursements, allowances and payments made by us or either of us in respect of or on account of the said testator's funeral expenses, debts and personal estate, together with the times when, the names of the persons to whom, and the purposes for which the same were disbursed, allowed or paid.

5. And we each, speaking positively for himself, and to the best of his knowledge and belief, as to other persons, further say that save and except as appears in the said account marked A, we have not, nor hath either of us, nor have nor hath any other persons or person, by our or either of our order, or for our or either of our use possessed, received, or got in any part of the said testator's personal estate nor any money in respect thereof, and that the said account marked A, does not contain any item of disbursement, allowance or payment, other than such as has actually been disbursed, paid or allowed on the account aforesaid.

6. That to the best of our knowledge, information and belief, the personal estate of the said testator now outstanding or undisposed of, consists of the particulars set forth in the second schedule hereunder written.

7. That save what is set forth in the said second schedule there is not to our knowledge, information or belief, any part of the said testator's personal estate now outstanding or undisposed of.

8. That we have, according to the best of our knowledge, remembrance, information and belief, set forth in the third schedule here-

under written, the particulars of all the real estate which the said testator was seised of or entitled to at the date of his will, and at the time of his death (*if the testator acquired any estates after the date of his will, as follows*: in the first part of the schedule hereunder written, the particulars of all the real estate which the said testator was seised of or entitled to at the date of his will, and in the first and second parts of such schedule, the particulars of all the real estate which the said testator was seised of or entitled to at the time of his death.)

9. That save what is set forth in the said third schedule, the said testator was not, to the best of our knowledge, information or belief, at the date of his will or at the time of his death seised of or entitled to any real estate in possession, remainder or reversion, absolutely or contingently or otherwise howsoever.

10. That we have, according to the best of our knowledge, information and belief, set forth in the fourth schedule hereunder written, the particulars of all the incumbrances affecting the said testator's real estate, and what part thereof such incumbrances respectively affect.

11. That we have in the account marked B, now produced and shewn to us, according to the best of our knowledge, information and belief, set forth a full, true and particular account of all the rents and profits of the said testator's real estate which has come to our hands, or to the hands of either of us or to the hands of any person or persons by our or either of our order, or for our or either of our use, and the times when, the names of the persons from whom, on what account, and in respect of what part of such estate the same have been received, and the times when the same became due, and also a like account of the disbursements, allowances and payments made by us, or either of us, in respect of the said testator's real estate or of the rents and profits thereof, and the times when, the names of the persons to whom, and the purposes for which the same were made.

12. And we each speaking positively for himself, and to the best of his knowledge and belief, as to other persons, further say that save and except as appears in the said account marked B, we have

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not, nor hath either of us, nor have nor hath any other person or persons by our or either of our order, or for our or either of our use, possessed, received, or got in any rents or profits of the said testator's real estate, nor any money in respect thereof, and that the said account marked B, does not contain any item of disbursement, payment or allowance other than such as has actually been disbursed or allowed as above stated.

The first schedule above referred to.

1. £50 cash in house.
2. £100 cash at the credit of the said testator at the Commercial Bank of Canada.
3. £1000 stock of the Commercial Bank of Canada standing in the testator's name.
4. £10 due from John James for half year's rent of house at — to the — day of —, 1863.
5. £32 6s. 8d. balance remaining due from John Thomas on account of half year's rent of lot No. —, to the — day of —, 1863.
6. £300, a debt due from Samuel Jones on bond, with interest from the — day of —, 1863, at six per cent.
7. A leasehold house, situate at —, held under a lease for a term of — years, which will expire on the — day of —, 1870, at a rent of £— a year, under-let to James Evans for a term which will expire on the — day of —, 1865, at a rent of £50 a year.
8. £25, half a year's rent due from the said James Evans to the — day of —, 1863.

The second schedule above referred to.

[The particulars to be set forth in the same manner as above.]

The third schedule above referred to.

[To contain a short particular of the real estate.]

The fourth schedule above referred to.

[To contain a short particular of the incumbrances, and showing what part of the real estate is subject to each.]

FORMS OF PROCEEDINGS.

[AFFIDAVIT UNDER ORDER XLIII., SEC. 11.]

IN CHANCERY.

A.

(Title.)

RECEIPTS.

DISBURSEMENTS.

No. of Item.	Date when received.	Names of person from whom received.	On what account received.	Amount received.	No. of Item.	Date when paid or allowed.	Names of person to whom paid or allowed.	For what purpose paid or allowed.	Amount paid or allowed.
				£ s. d.					£ s. d.
1	1862.		Found in house....	50 0 0	1	1862.	James Price....	Undertaker's bill for funeral....	42 0 0
2	Jan. 5.	Commerr'l Bank of Canada....	Balance at credit of testator.....	100 0 0	2	Jan. 6.	Messrs. A. & B.	Solicitor's bill for obtaining probate.....	10 0 0
3	" 10.	Do.....	Half-year's dividend on £1000 stock, due 5th..	30 0 0	3	Feb. 20.	John George....	A debt due to him for medical attendance.....	10 0 0
4	" 15.		Half-year's rent due — day of —, 1862.....	10 0 0	4	July 10.	James Price....	Bond debt of £1000, and £25 for interest thereon from the — day of —, 1862, to date...	1025 0 0
5	Feb. 10.	John James.....	Half-year's rent of leasehold house, due — day of —, 1862.....	315 0 0		Dec. 20.			
6	Mar. 18.	Samuel Jones...	Bond debt of £300 & interest from the — day of —, 1862, to the 18th day of March, 1862.....	25 0 0					
7	June 10.	James Evans....	Half-year's rent of leasehold house, due — day of —, 1862.....	500 0 0					
	Sept. 16.	W. Williams....	Produce of sale of above leasehold house						

7	Sep. 16. W. Williams.....	25 0 0
	Produce of sale of above leasehold house	500 0 0

IN CHANCERY.

B.

(Title.)

RECEIPTS.

DISBURSEMENTS.

No. of Item.	Date when received.	Names of persons from whom received.	On what account, and in respect of what part of the estate received and when due.	Amount received.	No. of Item.	Date when paid or allowed.	Names of persons to whom paid or allowed.	For what purpose paid or allowed.	Amount paid or allowed.
1	1862. Jan. 5.	John James.....	Half-year's rent for lot No. —, due — day of —, 1861.....	£ s. d. 50 0 0	1	1862. Jan. 5.	Sun Insurance Office	One year's insurance against fire due — day of —, 1862.....	£ s. d. 5 0 0
2	Feb. 2.	Thomas Jones....	One quarter's rent of house at —, due — day of —, 1861.....	10 0 0	2	Feb. 10.	Thos. Carpenter	Repairs at John James' farm....	15 8 0
3	Mar. 25.	James Francis..	Six weeks' rent of cottage at —, due to this day.	3 0 0	3	Mar. 25.	James Francis...	Taxes paid on cottage leased to him	1 0 0
4	July 5.	John James.....	Same as No. 1, due 25th of March last.....	50 0 0					

FORMS OF PROCEEDINGS.
[AFFIDAVIT UNDER ORDER XLIII., SEC. 11.]

FORMS OF PROCEEDINGS.
[AFFIDAVITS AS TO RECEIVER.]

These accounts A. and B. must not be annexed to the affidavit, but must be made exhibits and endorsed in the usual manner, see Orders XXXV., sec. 2, and XLII., sec. 6, *supra*, pp. 162 and 190. Every sheet and every alteration and erasure should be signed by the commissioner taking the affidavit. The items should be set out chronologically.

Affidavit of receiver verifying account.

I, A. B., of the (city) of (Toronto,) in the county of (York) and province of Canada, (Esquire,) the receiver appointed in this cause, make oath and say:—

1. That the account contained from page one to page —, both inclusive, in each of the two several books marked severally A. and B., now produced and shewn to me, and purporting to be my account of the rents and profits of the real estate, and of the outstanding personal estate of C. D., the testator in this cause, from the — day of —, in the year, &c., to the — day of —, in the year, &c., both inclusive, doth contain a true account of all and every sum and sums of money received by me, or by any other person or persons by my order, or to my knowledge and belief, for my use, on account or in respect of the said rents and profits accrued due on or before the said — day of —, in the year, &c., (the day to which the account is made up,) or on account or in respect of the said personal estate, (other than and except what is included as received in my former accounts, sworn to by me.)

2. That the several sums of money mentioned in the said account hereby verified, to have been paid and allowed, have been actually and truly so paid and allowed for the several purposes in the said account mentioned.

3. That the said account is just and true in all and every the items and particulars therein contained, according to the best of my knowledge and belief. (c)

Affidavit as to fitness of proposed receiver.

1. That I know, and have for — years last past been well ac-

(c) If the receiver has been appointed for another purpose than to receive the rents and profits of the real and personal estate of a deceased, the affidavit can be altered accordingly, and should in all cases follow the words of the order appointing the receiver.

acquainted with A. B., of the — of —, in the county of —, Esquire, the person proposed to be appointed receiver in this cause.

2. That the said A. B. is a person of great respectability and integrity, and well versed in matters of business, and possesses an accurate knowledge of accounts and books of account.

3. That to the best of my judgment and belief, the said A. B. is a fit and proper person to collect and receive, and to be appointed receiver of (*as in the order for receiver.*)

Joint affidavit of justification by receiver's sureties.

1. That I, the said deponent, A. B., am worth the sum of — dollars (*d*) lawful money of Canada, over and above what is sufficient to pay all my just debts.

2. And I, the deponent C. D., for myself say that I am worth the sum of — dollars (*d*) lawful money of Canada, over and above what is sufficient to pay all my just debts.

Affidavit for fixing a reserved bidding.

1. That I have carefully inspected and valued lot number — in the — concession of the township of —, in the county of —, being the premises ordered to be sold in this cause, and proposed to be sold in — lots, numbered one, &c., respectively in the draft advertisement of sale herein now shewn to me and marked A.

2. That lot numbered one in the said draft advertisement is, in my judgment, worth the sum of — or thereabouts, (though so much may not be obtained, as it requires considerable expenditure in the repair of, &c., *state defects*,) and I say that in my opinion the reserved bidding on said lot number one should not be fixed at a higher sum than £—. (*Go through all the lots in the same way.*)

Affidavit verifying advertisement of sale.

1. That I am well acquainted with lot No. — in the — concession of the township of —, in the county of —, being the premises ordered to be sold in this cause.

(*d*) The amount inserted is usually twice the annual value of the estate.

2. That the said lot consists of two hundred acres of land, of which one hundred acres are cleared, and the remainder well timbered with beech and maple, the land cleared is of a light loam in a good state of cultivation (*give full particulars as to character of soil, &c.*)

3. The said lot is situate about seventeen miles from the town of —, readily accessible thereto by good roads, which said town of — offers a good market for the sale of produce.

4. The said lot in addition to being well timbered is also well watered, and has erected thereon farm buildings consisting of (*fully describe them, saying whether in brick or wood, and how long erected.*)

5. There is a good orchard consisting of — acres of land, well stocked with excellent fruit trees.

6. The lot is well fenced.

7. There is a prior mortgage on the property (*if so*) for the sum of — pounds, payable to (*state particulars.*)

8. The lot is now in the occupation of (*state particulars of tenancy.*) (*e*)

Affidavit as to fitness of proposed auctioneer.

1. That I am well acquainted with A. B. of the — of — in the county of —, auctioneer.

2. That the said A. B. has resided in the said — of —, being the place where the lands and premises in question in this cause are directed to be sold, during the space of — years last past, during which period he has carried on the business of an auctioneer and land agent generally.

3. That the said A. B. is of good repute for integrity and skill in his said business, and is willing to undertake the management and conduct of the sale of the said lands and premises, and is to the best of my judgment and belief in all respects a fit and proper person to be intrusted and employed in the sale thereof.

(*e*) It is the duty of a vendor, in his particulars of sale, to describe the property with perfect accuracy and not leave it to inference. (*Swasland v. Dearsley*, 29 Bea. 480.)

See Order XXXVI. of the Orders of June, 1858, pp. 162–166, *supra*, and Order of 22nd February, 1862, pp. 271, 272, *supra*.

Affidavit of auctioneer as to result of sale.

I A. B., of the — of —, in the county of —, the auctioneer appointed by the master of this honourable court at —, to sell the lands and premises comprised in the particulars herein-after referred to, make oath and say.

1. That I did, according to the appointment of the said master, at the time and place, in the lots, and subject to the conditions specified in the particulars and conditions of sale hereunto annexed, marked respectively A. and B., &c., offer for sale by public auction, the lands and premises described in the said particulars, and that the results of such sale are as appear from the several signed contracts appearing at the foot of the said conditions of sale marked respectively B. C., &c.

2. That the sums set forth in the said several contracts are the highest sums bid for the respective lots therein respectively mentioned, and that — of —, and — of —, being the persons whose names are respectively subscribed to the said several contracts, were respectively declared by me to be the highest bidders for, and became the purchasers of, the lots respectively mentioned in the said several contracts, at the prices or sums of — and — respectively, being the prices or sums in the said several contracts respectively mentioned.

3. That the several lots numbered respectively one, two, &c., in the said particulars, were not sold, no person having bid a sum higher than or equal to the reserved biddings fixed for the same respectively by the said master.

4. That no person bid any sum whatever for either of the lots numbered respectively four and five, in the said particulars.

5. That the said sale was conducted by me in a fair, open and proper manner, and according to the best of my skill and judgment.

Affidavit as to insertion of advertisements and publication of bills or posters.

1. That in pursuance of the direction of the master in ordinary of this court (or of the master of this court at —) who settled the advertisement and particulars and conditions of sale for the sale of

the lands mentioned or referred in the decree (*or order*) made in this cause, I caused such advertisement to be published in the (*nam- ing the newspaper or newspapers*) once in each week for the four weeks immediately preceding the said sale (*or as the case may be.*)

2. That in pursuance of the said direction I caused bills of the the said sale to be published in different parts of the township (*town or city*) of — and the adjacent country and villages (*or as the case may be.*)

3. That twenty-five of the said bills or posters were published and distributed for four weeks immediately preceding the said sale in taverns adjacent to the said land, and fifty others of the said bills and posters were published and posted in conspicuous public places in different parts of the said township (*town or city*) of —, and the adjacent country and villages, (*or as the case may be,*) and that twenty-five others of the said bills or posters were distributed to the auctioneer and the solicitors of the various parties interested in this cause.

Affidavit to support application for an order appointing a guardian to an infant and for maintenance.

I, A. B., of, &c., (the mother) of the above named infant (defendant) C. D., make oath and say :

1. That the above named infant was of the age of — years on the — day of — last.

2. That D. D., the father of the said infant, died on or about the — day of —, in the year, &c., having made his last will and testament bearing date the — day of —, in the year, &c., whereof he appointed E. F. and G. H. executors, by whom the said will has been duly proved in the proper Surrogate Court, but which said will does not contain any appointment of guardian to the person of the said infant.

3. That the fortune of the said infant consists of (*set out particulars of the infant's fortune.*)

4. That the nearest relations of the said infant, other than and except myself, are as follow : (*state the uncles and aunts, if any, if the infant has any brothers and sisters, state them with their ages.*)

5. That I have for ——— years last past known and been intimately acquainted with J. K. of, &c., and that he is a gentleman possessed of considerable property, and is a person of great respectability, (*if the infant be a female, state whether the proposed guardian is married and what family he has,*) and in my opinion a fit and proper one to be appointed guardian of the person of the said infant; and I am desirous that he should be appointed such guardian during the minority of the said infant, jointly with myself. (f)

Affidavit on production of documents.

1. I say, I have in my possession or power the documents relating to the matters in question in this suit, set forth in the first and second parts of the first schedule hereto annexed. (g)

2. I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. I further say, (*state upon what grounds the objection is made and verify the facts so far as may be.*)

4. I further say, that I have had, but have not now in my possession or power the documents relating to the matters in question in this suit, set forth in the second schedule hereto annexed.

5. I further say, that the last mentioned documents were last in my possession or power on (*state when.*)

6. I further say, (*state what has become of the last mentioned documents, and in whose possession they now are.*)

7. I further say, according to the best of my knowledge, remembrance, information and belief, that I have not now, and never have had, in my own possession, custody or power, or in the possession, custody or power of my solicitors or agents, or solicitor or agent, or

(f) The order usually made is one appointing the guardian and directing a reference to a master to fix a proper sum to be allowed for the maintenance, education and advancement of the infant. The consent of the proposed guardian to act should be in writing, and his signature thereto verified by affidavit.

(g) The two parts of the schedule are only necessary when the deponent objects to the production of some of the documents.

If the party denies having any, he is to make an affidavit in form of the seventh paragraph, omitting the exception.

in the possession, custody or power of any other person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of, or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the first and second schedules hereto, and save and except the confidential correspondence in and in relation to this suit between myself and my solicitor; and save and except also the pleadings and other proceedings in this suit; which said confidential correspondence, and pleadings and proceedings, I am advised and believe, form no portion of the documents required by this honourable court to be produced by me. (h)

The first schedule:—The first part thereof; shewing documents in my possession which I do not object to produce.

The second part; shewing documents in my possession, which I object to produce.

The second schedule:—Shewing documents which I have had, but have not now in my possession or power.

(h) See notes to Order XX. of the Orders of 1853, sec. 1, pp. 98 *et seq. supra*.

Where in the affidavit made by a defendant on an order for production of documents the ordinary words "or in the possession, custody, or power of my solicitor or agent" are omitted, the court will not hold such affidavit insufficient if a satisfactory reason is given for such omission. The words "I am informed," where there is no personal knowledge, are the same as "I believe." (*Woodhatch v. Freeland*, 11 W. R. 398.)

The court will accept the oath of the defendant whether documents are relevant; but the plaintiff has a right to judge for himself whether they will assist his case, and is entitled to the production of all relevant documents, except such as the court can clearly see have no bearing on the issue. (*Mansell v. Feeney*, 2 J. & H. 320.)

As to documents in the possession of a third party claiming a lien upon them, see *North v. Huber*, 29 Bea. 437.

It is not sufficient in order to avoid production in London, to state that books are in constant use, without stating that they cannot be moved without inconvenience. (*Hooper v. Gumm*, 2 J. & H. 602; 10 W. R. 644; 6 L. T. N. S. 891.) And see this case also as to letters written pending the suit by a plaintiff to his agent, to be communicated by the latter to the solicitor, and which were held to be privileged.

A defendant is entitled *after decree*, to obtain an order for the production of documents by a co-defendant. (*Hart v. Montifiore*, 30 Bea. 280; 8 Jur. N. S. 350; 31 L. J. Ch. 383.)

It had previously been held, (see *The Attorney-General v. Clapham*, 10 Hare, App. lxviii.; *Wynne v. Humberston*, 27 Bea. 421, cited *supra* p. 104,) that a co-defendant could not compel production of documents from a co-defendant. In the *Attorney-General v. Clapham*, the application was made *before decree*.

The practice as to production under the four-day order is the same with respect to the plaintiff as before set forth, p. 104, *supra*, with respect to a defendant. The defendant cannot obtain the order until he has answered the bill, the plaintiff can, after the time for answering has expired. The plaintiff will have to make an affidavit similar in form to that made by a defendant. (*Attorney-General v. Clapham*, 10 Hare, App. lxviii.; *Fiott v. Mullins*, 16 Jur. 946; *Rochdale Canal Company v. King*, 15 Bea. 11.) After the affidavit is made the same objection to particular documents may be made. There will also be the same necessity on the part of the defendant to shew an admission by the plaintiff of possession of the required documents. (*Lamb v. Orton*, 1 Drew, 414; *Wing v. Harvey*, 10 Hare, App. lxviii.; *Reynell v. Sprye*, 1 DeG. M. & G. 656.)

The privilege possessed by a solicitor of protecting himself from disclosing information received by him in his character of solicitor, only extends to the information derived by him from his client, and not to that obtained by him from *third persons*, although such information may be obtained in the course of, or in connection with the transaction of the business of his client. (*Ford v. Tennant*, 11 W. R. 324.) See also, *Greenough v. Gaskell*, 1 M. & K. 98; *Jones v. Pugh*, 1 Ph. 96; *Desborough v. Rawlins*, 3 M. & C. 515; *Herring v. Cloberry*, 1 Ph. 91; 11 L. J. Ch. 149; referred to in support of the demurrer by the witness in the case of *Ford v. Tennant*. The following cases were cited against the demurrer, which was overruled: *Griffith v. Davies*, 5 B. & Ad. 502; *Spenceley v. Schulenburg*, 7 East, 357; *Sawyer v. Birchmore*, 3 M. & K. 572; *Bramwell v. Lucas*, 2 B. & Cr. 745; *Tippins v. Coates*, 6 Hare, 16; *Gore v. Bowser*, 5 DeG. & Sm. 80.

It was held by *Stewart, V. C.*, that a creditor coming in after decree could not, without a bill, have an affidavit of documents. But held by the Lords Justices on appeal, that a creditor coming in to prove under an administration decree, has a right to compel the executors to produce on oath all documents relating to his claim or which may enable him to make out his case. (*McVeagh v. Croll or Croall*, 11 W. R. 457; 9 Jur. N. S. 240.) The cases cited in support of the order to produce were, *Hart v. Montifiore*, 30 Bea. 280; *Paxton v. Douglas*, 8 Ves. 520; *Whitaker v. Wright*, 2 Hare, 310; *Hyde v. Edwards*, 12 Bea. 160; 1 M. & G. 410.)

The right of a creditor coming in to prove his debt under an administration order or decree, to compel the executors to produce under oath all documents in their possession, relating to his claim, or which may enable him to make out his case, has never been questioned in our court, and has always been conceded. The order has always been made by the master on the general jurisdiction. (2 Dan. Ch. P., 3rd ed., 943.) The decree having been considered in the nature of a judgment for all the creditors. (*Paxton v. Douglas*, 8 Ves. 520.) After the decree for the administration, all creditors are entitled and are bound to come in and prove their debts—no creditor is permitted to sue at law. And when the creditor has offered before the master *prima facie* evidence of his debt, he is entitled to an affidavit from the executors as to the documents in their possession or power relating to his claim, or any part of it. Of course he is not entitled to the production of documents relating to the suit generally, but to such as may throw light on his claim.

Supplementary observations on affidavits generally.—For authority that the name of

[AFFIDAVITS.—SUPPLEMENTARY OBSERVATIONS ON.]

the court should be correctly stated, see *Lumbrozo v. White*, 4 Dict. 150; and that the full style of the cause or matter must be set out, see *Hawes v. Bamford*, 9 Sim. 658; *May v. Prinsep*, 11 Jur. 1082; *Davis v. Barrett*, 7 Bea. 171. Where a party obtained an order on motion, the other side not appearing; and the service of the notice of motion was regular, but was supported by an imperfect affidavit as to style of cause, a new notice of motion had to be given. (*Barton v. Chambers*, 4 Bea. 547.)

The words "make oath," &c., should not be omitted in the commencement, the word "sworn" in the jurat is not of itself sufficient. (*Prentice v. Phillips*, 2 Hare, 542; 12 L. J. Ch. 497; 7 Jur. 528.)

Affidavits to be used in the master's office, must be filed. (*Stubbs v. Sargon*, 2 Bea. 496; 8 Jur. 1118; *ex parte Hartley*, 4 Jur. 500.)

The deponent must *sign* either by writing his name, or if he cannot write, by making his mark; (*Anderson v. Stather*, 9 Jur. 1085;) and where the deponent cannot write, it is improper for him to *sign* his name in full with the assistance of a person guiding his hand, without also making his mark, so that the fact of his illiteracy may appear. (—— *v. Christopher*, 11 Sim. 409; 10 L. J. Ch. 145.)

Where an affidavit deposes to words spoken, it is a proper caution in the affidavit to add "or to that effect." (*Ayliffe v. Murray*, 2 Atk. 60.)

Affidavits to support an application for a writ of arrest, should disclose a clear case of intention on the part of the defendant to leave the province, and that some preparations have been made by him with that view. (*Sichel v. Raphael*, 4 L. T. N. S. 114.)

In proving a mortgage debt, if the mortgage has not been proved in the cause, or the parties are not competent, or are unwilling to admit it, the due execution must be proved by affidavit.

In affidavits of execution of bonds and other documents of a like nature, produced for the approval of the Court of Chancery, it is sufficient to use the form of *jurat* generally used. (*Re Aulsebrook*, 4 Grant's Chancery Rep. 109.)

ORDERS.

Preliminary observations.—An order of court, however certain it may be that it is erroneous, must not be disregarded or treated as a nullity. It is discharged on a proper application for that purpose; *Chuck v. Cremer*, 2 Pa. 1 Ch. 92; *Hughes v. Williams*, 6 Hare, 71; 16 L. J. Ch. 200; 11 Jur. 287. An order operates, although irregularly obtained, until by such proper application it is discharged. (*Blake v. Blake*, 7 Bea. 514.) An order "to discharge an irregular order with costs," carries the costs of the application to discharge it, (*West v. Smith*, 8 Bea. 492; 10 L. J. Ch. 218,) and where an irregular order has been obtained, no subsequent order to the same effect can be had, until the former has been discharged. (*Pearce v. Gray*, 4 Bea. 127; 10 L. J. Ch. 353.) Applications to discharge orders for irregularity must be made without delay. (*Joseph v. Simpson*, 10 Price, 25.)

An order for leave to amend operates from the time of service only. (*Price v. Webb*, 2 Hare, 515; 13 L. J. Ch. 50.)

The four-day order for production in the master's office, by a party to the cause, does not require personal service. (*Hobson v. Sherwood*, 6 Bea. 68; 12 L. J. Ch. 447; 7 Jur. 687.)

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Service of an order, not producing the original, is not good, unless that production is waived. (*Wallis v. Glynn*, 19 Ves. 380.) An order obtained of course, or on an *ex parte* application ought to be served as soon as possible on the party intended to be affected by it, or his solicitor. (*Church v. Marsh*, 2 Hare, 652; *Daniell's Ch. Pr.*, 3rd edit. p. 1192.) As the order of course cannot be opposed (*Eyles v. Ward*, *Moseley*, 255) if irregular, motion should be made to discharge it.

All orders must be entered, and any proceedings taken under an order before it is entered, are voidable and irregular. (*Tolson v. Jervis*, 8 Ben. 864.)

All orders are entitled as follows:—

IN CHANCERY,
(If in chambers, add)
In Chambers,
The Chancellor,
(or as the case may be.)

— the — day of — in the —
year of the reign of Her Majesty, Queen
Victoria, and in the year of our Lord,
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Between A.B.,
and
C.D.,
Plaintiff,
Defendant.

Order for security for costs, obtained on præcipe.

Upon the application of the defendant, —, and it appearing by — that the said plaintiff resides — out of the jurisdiction of this court: It is ordered, that the plaintiff do procure some sufficient person or persons, resident within the jurisdiction of this court, to give security on — behalf, in the penal sum of not less than — pounds, to answer the costs of the said defendant —, in case this court shall think fit to award any — before the said defendant — shall be obliged to put in his answer to the — bill.

Order for substituted service of bill of complaint.

Upon the application of the plaintiffs, and upon hearing read the affidavit of — filed in this cause: It is ordered that personal service of an office copy of the plaintiffs' bill filed in this cause, with the notice and certificate thereon endorsed, as required by the General Orders of this court, together with a copy of this order, upon the said defendant — as the agent of the said defendants, shall be deemed good service upon the said defendants.

Order for service of bill of complaint on defendant in Lower Canada.

Upon the application of the plaintiff, and it appearing by affidavit that the said defendant ——— resides at ———, in that part of this province formerly called Lower Canada, out of the jurisdiction of this court: It is therefore ordered, that personal service of an office copy of the plaintiff's bill, together with the notice and certificate endorsed thereon, required by the General Orders of this court, and a copy of this order, upon the said defendant ——— in Lower Canada, shall be deemed good service: And the said defendant ——— to answer the plaintiff's bill within ——— after such service: and at the time of effecting such service, this order is to be produced and shewn to the said ———.

Order for service of bill of complaint on defendant out of the jurisdiction.

Upon the application of the plaintiff, and it appearing by affidavit that the said defendant ——— resides at ———, out of the jurisdiction of this court: It is therefore ordered, that personal service of an office copy of the plaintiff's bill, together with the notice and certificate endorsed thereon, required by the General Orders of this court, and a copy of this order, upon the said defendant ——— aforesaid, shall be deemed good service: And the said defendant ——— is to answer the plaintiff's bill within ——— after such service: and it is ordered that an affidavit of such service, and of the identity of the said defendant ———, sworn before the mayor or other chief magistrate of any city, town, or borough, where, or near which, such service shall be effected, shall be deemed sufficient proof of such service and identity.

Order for service of bill of complaint on defendant by advertising.

Upon the application of the said plaintiff, and it appearing to this court by affidavit that the said defendant ——— has left this province, and cannot be found to be served with an office copy of the plaintiff's bill in this cause: It is ordered that the said defendant ——— do, on or before the ——— day of ———, next, answer or demur to the plaintiff's bill; and it is ordered that a copy of this

order, together with the notice required by the General Orders of this court, be published in the _____ newspaper at _____, once in each week, for the _____ weeks next preceding the said _____ day of _____ next.

Another form.

Upon the application of the plaintiff, and it appearing by affidavit that after due diligence, the said defendant _____ cannot be found to be served with an office copy of the plaintiff's bill in this cause: It is ordered, that the said defendant _____ do, on or before the _____ day of _____ next, answer, or demur to the said bill: and It is ordered, that a copy of this order, together with the notice required by the General Orders of this court be published in the _____ newspaper, published in the _____ not less than _____ weeks before the _____ day of _____ next, and to be continued once in each week until the said day.

Order for a married woman to answer separately from her husband.

Upon the application of the plaintiff and upon hearing read an affidavit of the service of the plaintiff's bill upon the said defendant _____ the husband of the said defendant _____ and no answer thereto being filed by her, although the time allowed for answering the said bill has expired, as by the certificate of the _____ registrar of this court _____ appears: It is ordered, that she the said last named defendant do, within four weeks after service of an office copy of the said bill, with the notice ~~and certificate~~ endorsed thereon, as required by the General Orders of this court, together with a copy of this order, put in her answer to the said bill, separate and apart from her said husband.

Order allowing a demurrer.

The matter of the demurrer of the above named defendant, *John Styles*, coming on to be heard before this court in the presence of counsel for the plaintiff, and the said last named defendant, this court doth think fit to allow the said demurrer with costs to be taxed by the master of this court, and paid by the plaintiff to the said

last named defendant; (but the said plaintiff is to be at liberty to amend his bill of complaint in this cause as he shall be advised, amending the same within ——.)

Order to amend, obtained on præcipe.

Upon the application of the plaintiff: It is ordered, that he be at liberty to amend his bill of complaint in this cause as he may be advised without costs, amending the defendant's office copy thereof, and making such amendment within fourteen days from this date.

Order appointing guardian ad litem to an infant defendant.

Upon the application of the plaintiff and upon hearing read the affidavit of —— and an affidavit of the service of notice of this application, and it appearing that the said defendant —— is an infant under the age of twenty-one years: It is ordered that ——, one of the solicitors of this court, be, and he is hereby appointed guardian to the said infant defendant, by whom he may answer the plaintiff's bill and defend this suit.

Order pro confesso obtained on præcipe.

Upon the application of the plaintiff, and it appearing by affidavit that the said defendant —— has been personally served with an office copy of the plaintiff's bill, together with the notice and certificate endorsed thereon required by the General Orders of this court, and no answer having been put in by the said defendant ——, although the time limited in that behalf has elapsed, as by the certificate of the —— registrar —— appears: It is ordered that the said plaintiff be at liberty forthwith to set this cause down to be heard in order that the said bill may be taken *pro confesso* against the said defendant.

Order pro confesso after service of bill on defendant by advertising.

Upon the application of the plaintiff, and it appearing that by an order of this court bearing date the —— day of —— last, it was ordered, that the said defendant —— should on or before the

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— day of — answer, or demur to the plaintiff's bill in this cause: and that a copy of the said order, together with the notice required by the General Orders of this court, should be published in the — newspaper published at —, once in each week, for the four weeks next preceding the said — day of —.

Whereupon, and upon hearing read the affidavit of —, and the exhibits therein referred to, and it appearing to the satisfaction of this court that the said order and notice had been duly published as directed, and that no answer has been put in by the said defendant — as by the certificate of the — registrar of this court — appears. It is ordered, that the said plaintiff be at liberty forthwith to set this cause down to be heard in order that — bill of complaint may be taken *pro confesso* against the said defendant.

Order to produce (the four day order obtained on præcipe.)

Upon the application of the said plaintiff or defendant (*as the case may be*): It is ordered, that the said plaintiff or defendant (*as the case may be*) do, within four days after service of this order upon him or his solicitor, produce before and leave with the registrar of this court, upon oath, all deeds, books, papers, writings and documents in his custody or power relating to the matters in question in this cause; and that the said plaintiff or defendant (*as the case may be*) be at liberty to inspect, and take copies of, or extract from the same; and that the registrar do cause the same to be produced before any master or examiner of this court, and at the hearing of this cause.

Order nisi made on non-production under last Order.

Upon the application of the — and it appearing that, by an order bearing date the — day of —, it was ordered that the said — should, within four days after the service of the said order, produce all books, deeds, papers, writings, and documents, in — custody or power — relating to the matters in question in this cause, under oath, and deposit the same with the — registrar of this court —. And the said — not having produced before or left with the said — registrar, the books, deeds,

papers, writings, and documents, aforesaid, or filed any affidavit relating thereto, although duly served with the said order, as by the certificate of the said — registrar appears: It is therefore ordered that the said — do, within four days after the service upon — of this order, produce before and leave with the — registrar of this court — upon oath, all the books, deeds, papers, writings, and documents aforesaid; and in default thereof, that the sheriff of any county or united counties in which the said — may be found, do take the said — into his custody, and commit — to the gaol of his county or united counties, to answer — said contempt. Whereupon such further order shall be made as shall be just.

Order for the taxation of a solicitor's bill of costs.

In the matter of A. B., one of the solicitors of this honourable court.

Upon the humble petition of the above-named — and upon hearing read an affidavit of —, and it appearing by the said affidavit that —, in the said petition named, hath been furnished with a bill of fees, charges, and disbursements, incurred and disbursed by the said petitioner in carrying on certain business of the said — in pursuance of section twenty-nine of chapter thirty-five of the Consolidated Statutes for Upper Canada: It is ordered that it be referred to the master of this court — to tax the said bill, together with the costs of such taxation, and to settle by whom the same ought to be paid: and it is ordered that the said petitioner and the said — do produce before the said master, upon oath, all deeds, books, papers, and writings in his custody or power, respectively, relating to the said bill, or any of the items or charges therein; and may be examined upon oath touching the same, as the said master shall direct: and it is ordered that the said — do pay to the said petitioner what the said master shall certify to be due to — upon such taxation; and upon such payment, or in case the said bill shall appear to have been already paid, it is ordered that the said petitioner do deliver to the said —, upon oath, all deeds, papers, and writings in — custody or power, belonging to the said — and relating

to the said business; and if it appears that the said bill is overpaid, it is ordered that the said petitioner do re-fund and re-pay what shall appear to have been overpaid. And all proceedings at law, touching the said bill, are hereby stayed until after the said master shall have made his report.

Order to read pleadings and proceedings in another cause.

Upon the application of the plaintiff, (or defendant,) It is ordered that he be at liberty at the hearing of this cause, and otherwise to read all the pleadings, orders, and proceedings in a certain other cause now or lately pending in this court, wherein the said ——— is plaintiff, and ——— are defendants, as evidence on his behalf, saving all just occupations.

Order directing accounts and enquiries under administration order.

This court doth order that the following accounts and enquiries be taken and made by the master of this court ——— that is to say:

1st. An account of the personal estate not specifically bequeathed of ——— deceased, the testator in the pleadings named, come to the hands of ———, or to the hands of any other person or persons by ——— order or for ——— use.

2nd. An account of the said testator's debts.

3rd. An account of the said testator's funeral expenses.

4th. An account of the said testator's legacies.

5th. An enquiry, what parts, if any, of the said testator's personal estate are still outstanding or undisposed of.

And it is ordered that the said testator's personal estate not specifically bequeathed be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of his legacies.

And it is ordered that the following further accounts and enquiries be taken and made by the said master, that is to say:

6th. An enquiry what real estate the said testator was seized of or entitled to at the time of his death.

7th. An enquiry what incumbrances affect the said testator's real estate.

8th. An account of the rents and profits of the said testator's real estate, received by the said ——— or by any other person or persons by ——— order or for ——— use.

And it is ordered that the further consideration of this case be adjourned, and any of the parties are to be at liberty to apply.

Order appointing new day for the payment of money.

Upon the application of the plaintiff, and upon hearing read the report of the master of this court ——— bearing date the ——— day of ———, one thousand eight hundred and sixty ———. It is ordered that the said defendant ——— do pay the sum of ——— by the said report found due to the plaintiff into the ——— to the joint credit of the said plaintiff and the registrar of this court, between the hours of ten o'clock in the forenoon, and three o'clock in the afternoon of the ——— day of ——— instead of the time and place mentioned in the said report. And it is ordered that a copy of this order be served upon the said defendant ——— at least seven days before the said ——— day of ———.

Order final for foreclosure.

Upon the application of the plaintiff, and it appearing that by a ——— made in this cause bearing date the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, it was referred to the master of this court ——— to take an account of what was due to the plaintiff on the mortgage security in the pleadings mentioned, and to tax to the plaintiff ——— costs of this suit; pursuant whereunto the said master made his report bearing date the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, and thereby certified the sum of ——— to be due to the said plaintiff, which he appointed to be paid by the said defendant ——— into the ——— bank of ——— to the joint credit of ——— and the registrar of this court between the hours of ten of the clock in the forenoon and three of the clock in the afternoon of the ——— day of ———. At which time and place ——— the said defendant ——— did not nor did any one on ——— behalf ——— attend to pay, or hath since paid or tendered the same, as by the certificate of ——— and by the affidavit of

— now produced and read appears. Whereupon and upon hearing read the said decree and the master's said report, this court doth order that the said defendant — do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in, and to the mortgaged premises in the pleadings mentioned.

Another form, where parties made in the master's office, but who did not come in and prove any claim.

Upon the application of the —, and it appearing that by a — made in this cause bearing date the — day of — in the year of our Lord one thousand eight hundred and —, it was referred to the master of this court — to take an account of what was due to the plaintiff on the — in the pleadings mentioned, and to tax to the — costs of this suit; pursuant whereunto the said master made his report bearing date the — day of — in the year of our Lord one thousand eight hundred and —, and thereby certified the sum of — to be due to the said plaintiff, which he appointed to be paid by the said defendant — into the — bank of — to the joint credit of — and the registrar of this court, between the hours of ten of the clock in the forenoon and three of the clock in the afternoon of the — day of —. At which time and place the said defendant — did not nor did any one on — behalf attend to pay, nor hath since paid or tendered the same, as by the certificate of — and by the affidavit of — now produced and read appears. Whereupon and upon hearing read the said decree and the master's said report, this court doth order that the said defendant — do stand absolutely debarred and foreclosed of and from all right, title, and equity of redemption of, in, and to the mortgaged premises in the pleadings mentioned.

And it also appearing by the said report, that the defendants — made parties in the master's office, although duly served with process under the General Orders of this court in that behalf, had failed to attend or prove before the said master any subsisting lien, charge, or incumbrance upon the said lands and premises: it is therefore ordered that they, the said defendants last named, do stand abso-

lutely debarred and foreclosed of and from all right, title, and equity of redemption of, in, and to the premises aforesaid.

Final order of sale.

Upon the application of the plaintiff, and it appearing that by a decree — made in this cause, bearing date the — day of —, in the year of our Lord one thousand eight hundred and —, it was referred to the master of this court — to take an account of what was due to the plaintiff on the — in the pleadings mentioned and to tax to the plaintiff — costs of this suit; pursuant whereunto the said master made his report bearing date the — day of —, and thereby certified the sum of — to be due to the said plaintiff which he appointed to be paid by the said defendant — into the — bank of — at — to the joint credit of the said plaintiff and of the registrar of this court, between the hours of ten of the clock in the forenoon, and three of the clock in the afternoon of the — day of —. At which time and place neither the said defendant nor any one on — behalf did then pay or hath since paid, or offered to pay the same into the said bank at the — of — or to the plaintiff, as by the certificate of — the manager or cashier of the said bank, the affidavits of —, and of the said plaintiff, now produced and read appears. Whereupon and upon reading the said decree, and the master's said report this court doth order that the said lands and premises — in the — mentioned, or a competent part thereof, be sold in pursuance of and in manner directed by the said decree.

Præcipe for order to elect.

Whereas the plaintiff is prosecuting the defendant both at law and in this court for one and the same matter, whereby the defendant is doubly vexed, the said defendant hereby requires the usual order as of course that the plaintiff do elect in which court he will proceed.

Order to elect.

Upon the application of the defendant, and upon præcipe this day filed, and it appearing that the plaintiff doth prosecute the said

defendant both at law and in this court for one and the same matter, whereby the defendant is doubly vexed: it is ordered that the plaintiff do, within eight days after service hereof upon him or his solicitor, make his election in which court he will proceed, and if he shall elect to proceed in this court, then his proceedings at law are stayed by injunction, but if he shall elect to proceed at law, or in default of such election by the time aforesaid, then the said plaintiff's bill is from thenceforth to stand absolutely dismissed out of this court with costs to be paid by the said plaintiff to the said defendant forthwith after taxation thereof.

Order to dismiss for want of prosecution.

Upon the application of the defendant A. B., and upon hearing read the notice of motion herein, the notice of filing his answer herein, and an admission of service thereof, and the certificate of the (deputy) registrar of this court (at —) and upon hearing what was alleged on behalf of the said plaintiff: it is ordered that the plaintiff's bill of complaint in this cause be, and the same is hereby dismissed out of this court for want of prosecution, with costs to be paid by the said plaintiff to the said defendant forthwith after taxation thereof.

Order to examine de bene esse.

Upon the application of the — A. B., and it appearing that one C. D. now residing at — in the — of — and county of —, &c., is a material and necessary witness in this cause on behalf of the said — A. B., and that the said — A. B. cannot safely proceed to a hearing of this cause without the evidence of the said C. D., and that the said C. D. is upwards of seventy years of age (or is in a very sickly and infirm state of health and, in all probability not likely to live long) as by the affidavit of — now produced and read appears: it is ordered that the said — A. B. be at liberty to examine the said C. D. as a witness for him in this cause.

Præcipe for order to revive by real representatives of a deceased plaintiff.

- (i) The præcipe (which is substituted for a bill of revivor)

order, and all future proceedings, should be styled in the following manner, viz :

In Chancery,

Between

V. W.,

Plaintiff,

and

Y. Z.,

Defendant.

By original bill,

Between A. B., C. D., E. F., G. H., and J. K.,

Plaintiffs,

and

Y. Z.,

Defendant.

By revivor.

Whereas the plaintiff in the above named suit did, on the — day of —, depart this life intestate, leaving him surviving A. B. his widow, and C. D., E. F., G. H. and J. K., his children and co-heirs and co-heiresses at law, whereby the said suit became abated, and whereas the interest of the said plaintiff in the said suit has been transmitted by operation of law to the said A. B., C. D., E. F., G. H. and J. K., as his widow and co-heirs and co-heiresses respectively, the said A. B., &c., hereby require the common order to revive the said suit in the names of them the said A. B., C. D., &c.

Order to revive granted upon the above præcipe.

Upon the application of A. B., C. D., E. F., G. H., and J. K., and upon præcipe this day filed, and it appearing thereby that the plaintiff in the above mentioned suit did, on the — day of —, depart this life intestate, leaving him surviving the said A. B., C. D., &c., his widow and children respectively, whereby the said suit became abated, and that the interest of the said plaintiff in the said suit had been transmitted by operation of law to the said A. B., &c., as his widow and co-heirs and co-heiresses respectively. It is ordered that the said suit and all proceedings therein do stand revived in the name of the said A. B., &c., and be in the same plight and condition as the same were in at the abatement thereof.

Order to revive in the name of the personal representative of deceased defendant.

Upon the application of the plaintiff and upon præcipe this day filed, and it appearing thereby that the said plaintiff filed his bill of complaint in this cause on, &c., and that on, &c., the said defendant C. D. died, and that the said E. F. has become and is the executor of the said C. D. That the said cause and proceedings having become abated in manner aforesaid, the plaintiff is desirous of reviving the same. It is ordered that the said suit and all proceedings

(i) The form of the præcipe and order will of course vary infinitely according to the mode of abatement and transmission of interest, in all cases the abatement and transmission of interest or liability should be stated with accuracy and precision; for if the order be obtained upon allegations which turn out to be untrue, it will be liable to be discharged at any moment. The party reviving should also take care to serve all parties interested with a true copy of the order according to the requirements of the order of 6th of June, 1862, *supra*, p. 45.

A person institutes proceedings in Chancery at his own peril, and no matter how numerous the parties are, assumes all risk of abatement by death or otherwise; see *Hall v. Green*, 2 U. C. Jur. 42, where the fact that the plaintiff was unable to proceed on account of his inability to find the representatives of a defendant who had died, causing a partial abatement, was held to be no answer to a motion to dismiss for want of prosecution.

The Order of the 6th of June, 1862, contemplates two distinct changes in the constitution of a suit under which it may be necessary to *revive* or to *carry on the proceedings*. The actual *revivor* would appear to be necessary where the suit has become *abated* by death, marriage or otherwise, and the *order to carry on the proceedings* to be necessary where the same has become *defective* by reason of some change or transmission of interest or liability. In either of these events, and upon proper allegations the suit may be revived or continued by an order obtained upon præcipe. At first sight it would seem immaterial whether the præcipe and order were styled as above set forth or whether styled simply in the original cause; there is a distinction, however, and it is suggested that where a suit has become *abated*, the præcipe and order and all future proceedings should be styled in the manner above set forth, but where the suit has become *defective* merely, and an order is necessary to carry on the proceedings it may be obtained in the original cause, and its operative part may be as follows.

"It is ordered that the said suit and all further proceedings therein be in the same plight and condition as the same were in at the time of the same having become defective as hereinbefore mentioned, and be continued and carried on under the following style, namely:

Between A. B. Plaintiff,
and
C. D. Defendant.

(According to the new style of the suit.)

therein do stand revived and be in the same plight and condition as the same were in at the time of the said abatement. (*k*)

Order enlarging time for payment of mortgage money.

Upon the application of the defendant, and upon hearing read the notice of motion herein and the decree in this cause bearing date — day of — last, and the report of the master of this court (at —) and the affidavit of —, it is ordered that the said defendant do pay to the said plaintiff his costs of this application forthwith after taxation thereof; and it is ordered that upon the said defendant paying to the said plaintiff on or before the — day of — (*day appointed by the report*) the sum of £—, found due to the plaintiff by the said report for interest in respect of his mortgage in question herein and costs, that the time for the said defendant redeeming the lands and premises comprised in the said mortgage be enlarged for (six) calendar months; and it is ordered upon such payment being made that the said master is to compute subsequent interest upon the principal sum found due to the said plaintiff by his said report, and do tax to him his subsequent costs of this suit and do add the same to the said principal sum; and it is ordered that a new time and place be appointed for payment of what shall be found due to the plaintiff as aforesaid. But in default of the said defendant paying to the said plaintiff the said sum of £— (*the interest and costs above named*) by the time aforesaid the said defendant is to stand absolutely debarred and foreclosed of and from all right, title, and equity of redemption of, in, and to the said mortgaged premises.

Order appointing guardian, and directing maintenance, &c.

Upon the humble petition of the above named infant by A. B., his mother and next friend, and upon hearing read the said petition and

(*k*) If any party to a suit dies, his real or personal representatives, or both, (according to the nature of his interest,) must be made parties. The various changes in the constitution of a suit, as to parties, produce either *abatement* or simple *defectiveness*. The difference between *abatement* and simple *defectiveness* was never very clear, it is now unimportant, by Order of 6th June, 1862. See pp. 45, *et seq.*, and 278, *et seq.*, *supra*.

an affidavit of C. D., and upon hearing what was alleged: it is ordered that E. F. of the — of —, in the county of —, Esquire; be, and he is hereby appointed guardian to the said infant. And it is ordered that it be referred to the master of this court (at —) to enquire who has maintained the said infant since the death of G. H., the father of the said infant, and to fix a proper sum to be allowed for such maintenance, and for the maintenance and education of the said infant for the time to come during his minority, and out of what fund the same ought to be paid.

Order for injunction.

Upon the application of the above named plaintiff, and upon hearing read the notice of motion herein and the plaintiff's bill, and the affidavits of A. B., &c., filed herein, (and the exhibits therein referred to) and upon hearing what was alleged by counsel for both parties, it is ordered that an injunction do issue to restrain the defendant (his servants, workmen and agents, or his attorneys, solicitors, and agents from, &c., following the prayer of the bill and notice of motion) until the hearing of this cause (or until the further order of this court to the contrary.)

Order to dissolve injunction.

Upon the application of the above named defendant and upon hearing read the notice of motion herein, and the plaintiff's bill, and the affidavits of A. B., &c., filed herein, (and the exhibits therein referred to,) and upon hearing what was alleged by counsel for both parties, it is ordered that the order made in this cause, bearing date the — day of — last, be discharged, and the injunction issued thereon do stand absolutely dissolved.

Order overruling demurrer.

The matter of the demurrer put in by the defendant A. B. to the plaintiff's bill coming on the — day of —, to be argued before this court in the presence of counsel learned on both sides, the said demurrer being opened upon debate of the matter, and upon hearing what was alleged by counsel aforesaid, this court did order that the

same should stand over for judgment, and the same coming on this present day for judgment, in presence of counsel aforesaid, this court held the said demurrer to be insufficient, and doth therefore order that the same be overruled with costs to be paid by the defendant to the plaintiff forthwith after taxation thereof.

Order to discharge from custody a party committed for contempt.

Upon the application of the above named — A. B., and upon hearing read the notice of motion herein, and the affidavits of C. D. and E. F., &c., filed herein, (1) and upon hearing what was alleged on both sides, and it appearing that an attachment issued against the said A. B. under the order herein bearing date the — day of — last, directed to the sheriff of the county (or united counties) or — (and —) and that the said A. B. was arrested thereon; it is ordered that the said — on paying or tendering the costs of his contempt herein be discharged out of the custody of the said sheriff of the county (or united counties) of — (and —) as to his said contempt.

Order for writ of arrest.

Upon the application of the above named plaintiff, and upon hearing read the bill of complaint herein and the affidavit of A. B., and it appearing that the above named defendant is greatly indebted to the plaintiff and designs quickly to go into other parts beyond this province; it is ordered that a writ of arrest do issue against the said defendant until this court make other order to the contrary, and the said writ is to be marked in the sum of £— in words at length and not in figures.

Order to dismiss bill on præcipe by plaintiff before replication.

Upon the application of the plaintiff and upon præcipe this day filed, it is ordered that the bill of complaint of the said

(1) If the party has been committed for non-production, and moves to obtain his discharge on the ground of having since complied with the order, the proper evidence to be used is the certificate of the registrar or master, or deputy, as the case may be.

plaintiff be, and the same is hereby dismissed out of this court, with costs to be paid by the said plaintiff to the defendants A. B. and C. D., &c., forthwith after taxation thereof. (m)

Vesting order.

Upon the application of A. B. the purchaser of (parts of) the land sold in this cause, and upon hearing read the master's report upon the sale herein, and the solicitor for the said plaintiff appearing and consenting thereto, (and in pursuance of the sixty-third section of chapter twelve of the Consolidated Statutes of Upper Canada,) it is ordered that the lands so purchased by the said A. B. being (give full description,) be, and the same are hereby vested in the said A. B., his heirs and assigns for ever, for all the estate and interest of the said plaintiff, and the above named defendants (or as the case may be) therein.

Order to deliver possession of mortgaged premises after final order of foreclosure.

Upon the application of the plaintiff, and upon hearing read the final order of foreclosure in this cause and affidavits of the service of this notice of motion and of demand of possession, and no one appearing on behalf of the said defendant A. B., it is ordered that the said defendant A. B. do, within fourteen days after service upon him of this order, deliver up to the said plaintiff possession of the mortgaged premises in question in this cause, or so much thereof as he is in possession of.

Order to prove exhibits vivâ voce at hearing.

Upon the application of the plaintiff, it is ordered that he be at liberty at the hearing of this cause, to prove by affidavit or affidavits of the witness or witnesses who would be competent to prove the same vivâ voce the following exhibits, that is to say, (set out exhibits to be proved,) saving all just exceptions.

(m) If the defendants have not answered they will not be entitled to costs except under special circumstances, such as having filed affidavits on being served with notice of motion for injunction, or having obtained and served an order for security for costs.

Order to change solicitor.

Upon the application of the said defendant A. B. and by consent, it is ordered that he be at liberty to change his solicitor in this cause by making C. D. his solicitor, in the place and stead of E. F. his present solicitor.

Order for subpœna to issue to Lower Canada.

Upon the application of the said defendant A. B., and upon hearing read an affidavit of the said A. B., and it appearing that C. D. is a material witness for the defence of the said A. B., it is therefore, in pursuance of section four of the seventy-ninth chapter of the Consolidated Statutes of Canada, ordered that a writ of subpœna *ad testificandum* do issue directed to the said C. D. at ———, in that part of this province formerly called Lower Canada out of the jurisdiction of this court, to appear at the next ensuing examination term of this court, (*or as the case may be.*)

Order to amend by adding a party defendant.

Upon the application of the plaintiff, and upon hearing read the affidavit of A. B., and it appearing that one C. D. is a necessary party to the bill in this cause, it is ordered that the said plaintiff be at liberty to amend his bill of complaint herein by inserting therein the name of the said C. D. with apt words to change him as a defendant thereto.

Order absolute for non-production.

Upon the application of the plaintiff (*or defendant*) and it appearing that by an order made in this cause and bearing date the — day of — last, it was ordered that the said defendant (*or plaintiff*) A. B. should, within four days after the service upon him of the said order, produce before and leave with the (deputy) registrar (master) of this court (at —) upon oath, all books, deeds, papers, writings and documents in his custody or power relating to the matters in question in this cause, and in default thereof that the sheriff of any county or united counties in which the said defendant A. B. might be found should take the said defendant into his cus-

to-day and commit him to the gaol of his county or united counties to answer his said contempt. Whereupon, and upon hearing read an affidavit of the service of the said order and a certificate of the said (deputy) registrar (or master) and it appearing by such certificate that the said defendant hath not produced and left with the said (deputy) registrar the said books, deeds, papers, writings and documents, or filed any affidavit relating thereto, *(in the case of non-production pursuant to a master's direction, the words in this part of the order should be a copy of the master's certificate.)*

It is therefore ordered that the sheriff of any county or united counties, in which the said defendant A. B. may be found, do take him into his custody and commit him to the gaol of his county or united counties to answer his said contempt, and it is ordered that an attachment or attachments do issue accordingly.

Order on petition for re-hearing.

Upon the application of the defendant and upon hearing read his petition for the re-hearing of this cause, and the judge's fiat endorsed thereon, and the defendant having this day paid into court to the credit of this cause the sum of forty dollars by way of deposit to secure the costs of such re-hearing, and having signed an undertaking to pay such costs as may be awarded against him in respect of such re-hearing, it is ordered that this cause be set down to be re-heard before this court next after the causes and matters already set down.

DECREES.

Where a necessary provision is omitted in a decree the court will amend it on petition though passed and entered. (*Moffatt v. Hyde*, 6 U. C. L. J. 94.)

Where a decree in a partition suit, omitted to direct the execution of the necessary instruments and did not reserve the consideration of further directions, the court nevertheless on motion directed the execution of conveyances and the delivery of possession agreeably to the finding of the master. (*O'Lone v. O'Lone*, 2 Grant, 642.)

The words "liberty to apply" do not extend to an application by the plaintiff to be allowed costs, as to which there was no express direction given by the decree. (*Kendall v. Marsters*, 2 DeG. F. & J. 200.)

The act Con. Stats. U. C., cap. XIII., sec. 16, relating to the Court of Error and Appeal, does not deprive the court of its inherent jurisdiction to suspend the operation of its own decree pending an appeal. (*Cotton v. Corby*, 5 U. C. L. J. 67.)

Commencements of decrees.—On hearing.

This cause coming on (the — day of —, and) this present day to be heard before this court in the presence of counsel for all parties, (or for the plaintiff and the defendant A. B., no one appearing for the defendant C. D., although duly notified in that behalf, nor for the defendant E. F. against whom the bill has been taken *pro confesso*.) upon opening of the matter and upon hearing read the pleadings and depositions herein, and upon hearing what was alleged by counsel aforesaid, this court doth, &c.

If judgment reserved.

This cause coming on the — day of — last, (and the — day of — last) to be heard, &c., (as in foregoing,) this court did order that this cause should stand for judgment, and the same coming on this present day for judgment in the presence of counsel aforesaid, this court doth declare, &c.

On motion for decree.

This cause coming on this present day to be heard by way of motion for a decree against the defendant in the presence of counsel for both parties, upon opening of the matter and upon hearing read the pleadings and notice of motion herein and the affidavits of A. B. and C. D., and the exhibits therein referred to, and upon hearing what was alleged by counsel aforesaid, this court doth declare, &c.

On further directions.

This cause coming on this present day to be heard before this court on further directions, and as to the matter of (subsequent) costs in the presence of counsel for all parties (or for the plaintiff and the defendant A. B., no one appearing for the defendant C. D. although duly notified in that behalf, nor for the defendant E. F., against whom the bill has been taken *pro confesso*) upon opening of the

matter, and upon hearing read the decree in this cause bearing date the day of — last, and the report of the master of this court (at —) made in pursuance thereof bearing date the — day of — last, and upon hearing what was alleged by counsel aforesaid, this court doth, &c.

On bill and answer.

This cause coming on this present day to be heard before this court on bill and answer, in the presence of counsel for both parties, upon opening of the matter and upon hearing read the pleadings in this cause, and upon hearing what was alleged by counsel aforesaid, this court doth, &c.

Decree for redemption.

This court doth declare that the plaintiff is entitled to redeem the lands and premises comprised in the mortgage in the pleadings mentioned; and it is ordered that it be referred to the master of this court (at —) to take an account of what is due to the said defendant for principal money and interest upon the said mortgage, and to tax to him his costs of this suit, and upon the said plaintiff paying to the said defendant what shall be found due to him for principal money, interest and costs as aforesaid, within six calendar months after the said master shall have made his report at such time and place as the said master shall appoint; it is ordered that the said defendant do re-convey the said premises free and clear of all incumbrances done by him, and deliver up all deeds and writings in his custody or power relating thereto upon oath to the said plaintiff, or to whom he may appoint; but in default of the said plaintiff making such payment by the time aforesaid, it is ordered that the bill of complaint of the said plaintiff be dismissed out of this court, with costs to be paid by the said plaintiff to the said defendant forthwith after taxation thereof.

Decree for specific performance of contract for sale of land, on bill by vendor.

This court doth declare that the agreement in the pleadings men-

tioned ought to be specifically performed and carried into execution in case the plaintiff can make a good title to the premises in the said agreement mentioned, and doth order and decree the same accordingly; and it is ordered that it be referred to the master of this court to enquire and state whether a good title can be made by the said plaintiff to the said premises, and if so when a good title could have been first shewn by the said plaintiff; and the said master is to take an account of what is due to the said plaintiff under and by virtue of the said agreement for principal and interest in respect of the purchase money of the said premises; and this court doth reserve the consideration of further directions and costs until after the said master shall have made his report.

PETITIONS.

Preliminary observations.—See Order 5th of May, 1862, and notes pp. 275, *et seq.*, *supra*.

A petition, if in a suit, is entitled in the suit, it is addressed like the bill of complaint, "to the honourable the judges of the Court of Chancery," and headed "The petition of A. B., &c., one of the plaintiffs (or defendants as the case may be.)" It states succinctly the facts, and the substance, if possible, of the documents on which the prayer is founded; occasionally the documents must be set out; but the general rule is only to set out the material parts.

The prayer of a petition is like the prayer of a bill; it prays specifically the relief desired or such other relief as the court may think just and fit. The petitioner must *allege* what he intends to *prove*.

Petition for re-hearing.

1. That a decree was made in this cause in favour of and upon the application of the above-named plaintiff, on the ——— day of ———, A.D., 186—.

2. Your petitioner submits and is advised and believes that the said decree is erroneous in substance, and the same should be vacated and set aside, or should at least be materially varied. (*If the decree is to be varied, set out particulars of each objection.*)

Your petitioner therefore prays that the said decree may be vacated or varied as to this honourable court may seem just, and for that purpose that this cause may be re-heard before this honourable court.

Judge's fiat endorsed upon petition.

Upon the petitioner depositing ten pounds with the registrar and consenting to pay such costs as this court may award in respect of any proceedings had upon the decree in this cause since the date thereof, let the registrar set this cause down for re-hearing next after the causes already appointed.

Undertaking and certificate to be endorsed on petition.

I agree, for the purpose of obtaining a re-hearing of this cause, to deposit ten pounds, and to pay such costs, if any, as this court may award, in respect of any proceedings had upon said decree made herein.

Signed in the presence of }
C. D. } A. B.,
Solicitor for ———.

We hereby certify and submit that this is a proper cause for re-hearing.

A. B.
C. D.

Petition to tax solicitor's bill of costs.

In the matter of A. B., one of the solicitors of this honourable court.

(Address and commencement.)

1. That your petitioner was employed by C. D., of the village of ———, in the county of ———, a solicitor of this honourable court, as his agent in divers suits, causes, and matters in this honourable court.

2. That your petitioner sent his bills of fees, charges, and disbursements by post to the said C. D., at the said village of ———, on the ——— day of ——— last, which said bills were subscribed with the proper hand of your petitioner, and were also accompanied by a letter subscribed in like manner referring to such bills.

3. That the said C. D. has made no application to refer such bills of costs for taxation, nor has he paid the amount of such bills or any part thereof to your petitioner.

4. That your petitioner has not commenced any action for the recovery of such fees, charges, and disbursements.

Your petitioner therefore prays that it may be referred to the

master of this court to tax the said bills of fees, charges, and disbursements, and that the said C. D. and also your petitioner may produce before the said master upon oath as he shall direct all books, papers, and writings in their custody or power respectively relating to such bills or to any of the items or charges therein, and may be examined upon interrogatories touching the same as the said master shall direct, and that the said C. D. may be ordered to pay to your petitioner what shall appear to be due to him upon such taxation together with the costs of such reference and taxation.

And your petitioner will ever pray, &c.

Affidavits in support of above.

In the matter of A. B., one of the solicitors of this honourable court. I, E. F., of the City of Toronto, clerk of the said A. B., make oath and say, that on the — day of — last, I transmitted to C. D., at — in the county of —, the bills of fees, charges and disbursements mentioned and referred to in the petition in this matter, by depositing the same in Her Majesty's post-office, at the City of Toronto, aforesaid, which said bills were enclosed in an envelope addressed to the said C. D., written thereon. I further say, that the said bills were when so sent accompanied by a letter subscribed with the proper hand of the said A. B., and referring to the said bills. I further say, that at the time of mailing the said letter I requested that the same should be registered, and I paid the sum required for such purpose to the party to whom I delivered the said letter in the said post-office.

(Add affidavit by solicitor verifying petition in every particular.)

Petition for sale of infant's estate under 12 Vic., ch. 72, and for appointment of guardian.

IN CHANCERY.

In the matter of A. B., an infant, and in the matter of the 12th Victoria, chapter 72. To, &c.

The humble petition of A. B., of —, in the county of —, by C. D., her mother and next friend, and who applies by this petition to be appointed guardian for the said A. B.

Sheweth, that your petitioner is the daughter and only child of one B. B., in his life-time, of the — of —, deceased, and C. B., his wife, now C. D. That the said B. B. departed this life in or about the year —, intestate, leaving your petitioner and your petitioner's said mother him surviving.

That on or about the — day of —, your petitioner's said mother intermarried with and became the wife of D. D., of the — of —.

That the said B. B., at his decease, left but a trifling amount of personal property and no real estate, but the said B. B., at his decease, was entitled to the patent from the Crown for the following lands, on payment of certain moneys therefor, that is to say, (*describing them fully*).

That the said B. B. had, before his death, paid to the government the sum of £—, or thereabouts, on the said lots.

That the said D. D. did, in or about the month of —, on behalf of your petitioner, but out of his own money, pay to the government the full balance of money and interest due for said lots, amounting altogether to the sum of £— or thereabouts, and thereupon a patent for the said lots issued to and in the name of your petitioner as the heir-at-law of the said B. B. deceased, which patent bears date — day of —. That your petitioner is now over — years of age. That your petitioner has ever since the death of your petitioner's father lived with your petitioner's mother, and with the said D. D. since his marriage with your petitioner's said mother. That your petitioner was supported by her said mother until your petitioner's said mother intermarried with the said D. D., and since that time your petitioner has been supported by the said D. D., your petitioner having had no other means of support. That the said D. D. has a family of — other children, and he has been and is obliged to spend all his earnings in supporting his said family. That the said D. D., for the last — years, caused your petitioner to be educated, and to be kept at a respectable school in —, aforesaid; and has paid the necessary expenses in that behalf. That your petitioner is possessed of no other property than the said lands and premises aforesaid. That each of the said lots is

about one-fourth of an acre in size. That there are no buildings on any of said lots except on lot No. — on — street aforesaid, and your petitioner and said D. D. and C. D. have not nor has any or either of them derived any rents or profits therefrom. That on the said lot, No. —, on — street, there is a two-storied frame dwelling house, but it is badly built, and has been, until recently, in a bad state of repair. That the said D. D. received no rents from the said lot last mentioned until after the issuing of the patent as hereinbefore set forth. That since that time the said D. D. has received rents from the said last mentioned lot at the rate of £— pounds per annum. That the said D. D. did, in or about month of — last, expend the sum of £— or thereabouts in repairing and improving the said house, and since that time the said D. D. has received rent at the rate of £—. That your petitioner's said father was, at the time of his death, indebted to one — in a large sum of money. That the said — had from the time of the death of your petitioner's said father until about the date of the issuing of the letters patent as hereinbefore mentioned, continuously received the rents and profits of said lot, No. — on — street, whereby the said debt became satisfied.

That the said —, in or about the year —, pretending that the said debt had not been paid, endeavoured to obtain a patent for the said lots, to be issued to him, and for that purpose made application to the government of this province.

That the said D. D. opposed such claim of the said —, and succeeded in so doing, and procured a patent to issue to your petitioner as aforesaid.

That in resisting such claim on the part of said —, and in employing legal assistance therein, the said D. D. was put to expense and loss of time, which cost the said D. D. the sum of £— or thereabouts, and in procuring such patent to issue to your petitioner the said D. D. was put to an expense of £— or thereabouts.

That each of said lots, Nos. —, is worth the sum of £— or thereabouts, and the said lot, No. —, on — street, the sum of £— or thereabouts.

Your petitioner shews that the said lots of land would have been

lost to your petitioner, had not the said D. D. paid the said money therefor to the government, as aforesaid, and resisted the claim thereto set up by the said —, as aforesaid. Your petitioner submits, that under the circumstances aforesaid, the said D. D. is entitled to be indemnified for his expenses in supporting your petitioner from the said month of —, until the present time; and also for the moneys he has so expended as aforesaid, in paying for the said lots of land, and in repairing the said house, and in defraying the expenses in opposing the claim of the said — as aforesaid. And your petitioner is willing that one or more of said lots, as may be necessary, and such of them as it may seem desirable to sell, may be sold by and under the direction of this honourable court, and the proceeds applied towards paying the expenses aforesaid, and in providing for the future support of your petitioner. And your petitioner submits that lots Nos. — aforesaid, and lot No. —, on — street, if necessary, would be the most proper to be disposed of for the purposes aforesaid.

That the sum of £—, or thereabouts, together with the rent of the said lot No. — on — street, will be required for the future support of your petitioner. That your petitioner has not and never had a legal guardian appointed for her, and your petitioner submits that your petitioner's said mother is a fit and proper person to be appointed her guardian.

Your petitioner therefore prays that your petitioner's said mother may be appointed her guardian, and that it may be enquired according to the practice of this honourable court, what would be a proper allowance to be made to the said D. D., for the support and education of your petitioner, as aforesaid, from the time of the death of your said petitioner's father; and also, that it may be enquired what will be a proper allowance to be made for the future support and education of your petitioner; and also, that it may be enquired what expense the said D. D. has been put to in paying for the said lots to the government, as aforesaid, and in resisting the claim of the said —, as aforesaid, and in procuring the patent to be issued to your petitioner, as aforesaid, and in repairing said house on lot No. —, on — street, as aforesaid; and also, that it may be enquired what moneys the said D. D. has received as rents and

profits of the said lot No. —, on — street, for and on behalf of your petitioner; and that the said lots Nos. —, and lot No. —, on — street, if necessary, may be sold under the direction of this honourable court; and the proceeds arising therefrom applied first in paying the costs of this application, and the moneys the said D. D. may be entitled to for such past maintenance and expenses, as aforesaid; and secondly, in providing for such future maintenance of your petitioner; and for that purpose that such money so to be applied for such future maintenance may be paid to your petitioner's guardian, or to whom she may appoint; and that your lordships will be pleased to make such further or other order in the premises, as to your lordships may seem meet. And your petitioner will ever pray, &c. (n)

FORMS USED IN PROCEEDINGS IN THE MASTER'S OFFICE.

Surcharge.

(Full style of cause.)

The — seeks to charge the —, A. B., with the several sums of money of which the amounts and particulars are hereunder set forth beyond what the said —, A. B., has admitted to have received by his account marked (A) filed in the office of the master of this court (at —) on the — day of —, 186, under the decree (or order) in this cause bearing date the — day of —, 186, that is to say: (*set forth particulars of surcharge.*)

Notice of surcharge.

(Full style of cause.)

Take notice that the — seeks to charge the —, A. B., with the several sums of money of which the amounts and particulars are set forth in the schedule hereunder written, beyond what the said —, A. B., has admitted to have received by his account marked (A) filed in the office of the master of this court (at —) on the — day of —, 186, under the decree (or order) in this

(n) The practitioner must be careful to divide a petition similar to this, into paragraphs and number the same consecutively, following the practice thereon.

cause, bearing date the — day of —, 186 , (*if an affidavit has been filed in support of the surcharge, add,*) and that I have this day filed an affidavit of (the plaintiff, &c.,) in support of such surcharge.

Dated this — day of —, 186 .

C. D.,

—, Solicitor.

To the —, A. B., and to E. F., his solicitor.

The schedule above referred to.

(*Here state the amounts and particulars.*)

Examination paper on an examination before a master or special examiner.

IN CHANCERY.

(*Full style of cause.*)

Deposition of a witness sworn and examined in the above cause (or matter) before me.

A. B.

Master (at —)

Sworn the — day of —, 186 .

C. D., of the (township) of —, in the county of —, Esquire, (or C. D., the above named plaintiff, or defendant) examined on behalf of —, saith as follows, &c.:

I, &c.

Cross-examined on behalf of —.

I, &c.

Re-examined.

The like for cross-examination of witness on an affidavit.

IN CHANCERY.

(*Full style of cause.*)

Deposition of a witness cross-examined in the above cause (or matter) before me.

A. B.,

Master at —.

Sworn the — day of —, 186 .

C. D., of the (township) of —, in the county of —,

(Esquire,) (or A. B., the above named plaintiff, or defendant,) cross-examined on behalf of — on the affidavit of the said C. D., sworn in the above cause (or matter) on the — day of —, 186 , and filed on the — day of —, 186 , saith as follows :

I, &c., (o)

Re-examined.

Conclusion in both the above cases.

I certify that the depositions contained in this (and the six preceding) sheets of paper were taken by me, and were afterwards read over to the witness and signed by him in the presence of the parties attending.

A. B.,

Master (at —)

Advertisement for creditors to come in under a decree.

IN CHANCERY.

(Full style of cause or matter.)

Pursuant to a decree (or order) made in this cause (or matter) dated the — day of —, 186 , the creditors of E. F., late of the (township) of —, in the county of —, Esquire, deceased, who died on or about the — day of —, 1860 , are in person or by their solicitors, on or before the — day of —, 186 , to come in and prove their debts before me at my chambers (in Osgoode Hall, in the city of Toronto,) otherwise they will be peremptorily excluded from all benefit under the said decree (or order.)

(Monday) the — day of —, 186 , at — of the clock in the — noon at my said chambers is appointed for hearing and adjudicating upon the claims.

Dated at —, this — day of —, 186 .

G. H.,

Master (at —)

(o) Depositions must be taken in the first person of the deponent, see sec. 14, of Order II. of 23rd December, 1857, *supra*, p. 249.

IN CHANCERY.

Advertisement of sale.

(Full style of cause.)

To be (peremptorily) sold by public auction in pursuance of a decree and final order for sale made by the Court of Chancery of Upper Canada in this cause, bearing date respectively the — day of —, 186 , and the — day of — 186 , and with the approbation of A. B., Esquire, the master (in ordinary) of this honourable court (at —) on (Monday) the — day of —, at — of the clock in the — noon, at the chambers of the said master, at No. 1, — street —, (or at the auction room of Messrs. B. & C., No. 1, — street —, as the case may be) certain (freehold) premises being lot number one in the first concession of the township of —, in the county of —, containing by admeasurement 200 acres of land, more or less, (or some other sufficient description of the property) in one lot (or in — lots, consisting of, &c., set out lots, numbering them consecutively,) (p) (state also any particulars respecting the property which may be necessary, as to buildings, soil, condition of property, &c.)

The purchaser shall, at the time of sale, pay down a deposit in the proportion of £10 for every £100 of his purchase money to the vendor or his solicitors, and shall pay the remainder of his purchase money (with interest thereon from the day of sale) on the — day of — next.

(Here insert any particulars in which the proposed conditions of sale differ from the standing conditions, as where the premises are to be sold subject to a mortgage, or at an upset price, or a reserved bidding is to be allowed.)

In other respects, and except as above mentioned, the conditions of sale are the standing conditions of sale of the said Court of Chancery.

(p) If the lots are numerous and specified in a plan which is to be used at the sale, they may be described in the following manner: "in — lots, numbering from — street — (northward) according to a plan to be produced at the sale, each lot having a frontage on — street of — feet — inches, more or less, and a depth (westerly) to the (westerly) boundary of the said lot of — feet — inches.

The conditions of sale and further particulars may be obtained at the chambers of the said master (at —) and at the offices of Messrs. C. & D. at —, and Messrs. E. & F. at —.

Dated at —, this — day of —, 186 .

G. H.,

Master (at —)

Messrs. C. & D., solicitors for the (plaintiff or defendant, as the case may be.)

Abstract of title.

1. (1st January, 18—.) Patent from the Crown to A. A., whereby the Crown in consideration of £100 granted to said A. A., his heirs and assigns, (the lands in question in this cause being,) all that certain parcel or tract of land (*description.*)

2. (Date). Indenture of bargain and sale between said A. A. of the first part, Mary, his wife, of the second part, and B. B. of the third part.

It was witnessed, in consideration of £150 to said A. A., paid by the said B. B., said A. A. did grant, bargain and sell, &c., unto said B. B., his heirs and assigns, the said land and all the estate of said A. A. therein, (*or shortly as the granting part is worded in the indenture.*)

To have and to hold the same unto said B. B., his heirs and assigns, to and for his and their sole and only use for ever (*following the habendum shortly.*)

And Mary, wife of the said A. A., thereby barred her dower in said land.

(*Set out covenants shortly.*)

Executed by said A. A. and Mary, his wife, and attested, and receipt for consideration endorsed (*as the case may be.*)

Registered in the registry office of the county of — on the — day of — 18—.

3. (Date). Indenture of grant between said B. B. of the first part, and C. C. (*a feme sole*) of the second part.

It was witnessed in consideration of £200 to said B. B. paid by said C. C., said B. B. did grant unto said C. C., her heirs and assigns, said land and all the estate of said B. B. therein.

(*Habendum, covenants, execution, &c., and registration as in No. 2*)

Said B. B. (*the grantor*) was unmarried on the — day of — 18—, the date of present indenture.

4. (Date.) Indenture of grant between C. D., (formerly said C. C.,) wife of D. D. of first part, said D. D. of second part, and E. E. of third part.

It was witnessed in consideration of £250 to said C. D. paid by said E. E., said C. D. did, with the consent of said D. D., grant unto said E. E., &c.

And said D. D., in consideration of 5s., &c., granted unto said E. E., his estate in the said land.

(*Habendum and covenants as in No. 2.*)

Executed by said C. D. and D. D. at —, and attested, &c., (*as in No. 2.*)

Acknowledged by said C. D. in pursuance of the statute in that behalf before two of Her Majesty's justices of the peace at — (*the place of execution*) as appears by endorsement on present indenture.

Registered, &c., (*as in No. 2.*)

5. (Date.) Indenture of mortgage between said E. E. of the first part, Ann, his wife, of the second part, and F. F. of the third part.

(*Granting part and habendum as in No. 2, following mortgage shortly.*)

Proviso making void the present indenture on payment of £— with interest for the same at the rate of — per centum per annum, on the — day of —, 18—.

(*Covenants, execution, &c., and registration as in No. 2.*)

6. (Date.) Indenture of assignment between said F. F., of the first part, and G. G., of the second part. Reciting the hereinbefore abstracted indenture of mortgage No. 5, and that the sum of £— remained due by virtue thereof to the said F. F. for principal and £— for interest, to the day of the date of present indenture.

(*Granting part, habendum, execution, registration, &c., as in No. 2, following assignment shortly.*)

7. (Date.) Discharge of mortgage between G. G. of one part, and E. E. of other part.

Reciting payment of hereinbefore abstracted indenture No. 5.

Executed by said G. G., and attested by two witnesses, registered, &c., (as in No. 2.)

8. (Date.) Last will and testament of E. E., whereby the said E. E. devised the said land to H. H.

Executed by said E. E. in presence of two witnesses, who subscribed their names as such at the request of said E. E., in his presence.

Said E. E. died on the — day of —, 18—, without having altered or revoked the will hereby abstracted, and leaving said H. H. him surviving.

Said will proved in the Surrogate Court of the county of —, on the — day of —, 18—.

Registered, &c., (as in No. 2.)

9. (Date.) Indenture of grant between A. H., the widow, and B. H., C. H. and D. H., the children of said H. H., of the one part, and I. I. of the other part.

Reciting death and intestacy of said H. H., leaving him surviving said A. H., his widow, and B. H., C. H. and D. H., his only children and co-heirs and heiress at law.

(Set out shortly the granting part, habendum, and covenants, and state execution, attestation, &c., and registration, as in No. 2.)

Notice to object to be attached to the abstract when served. (Order XXXVI., sec. 12, p. 160, supra.)

IN CHANCERY.

(Short style of cause.)

Take notice that if you do not object to the title of the (plaintiff) to the land mentioned in the annexed abstract, being the land in question in this cause, and obtain and serve a warrant (or an appointment) from the master of this honourable court (at —) (or from a judge of this honourable court) to consider the same within

fourteen days from the service hereof, and of the delivery of the said abstract, you will be deemed to have accepted such title.

Dated this — day of —, 18—.

A. B.,
Solicitor.

To C. D., the —, and to E. F., his solicitor.

Report in foreclosure suit where no parties added by the master.

(Title as in decree.)

In pursuance of the decree made in this cause, bearing date the — day of —, one thousand eight hundred and —, I was attended by the plaintiff's solicitor, and it appearing to me by the certificate of the sheriff and (deputy) registrar of the county of — that no person or persons not before parties to this suit had any lien, charge, or incumbrance upon the lands and premises embraced in the plaintiff's mortgage in the bill in this cause mentioned subsequent thereto, I proceeded to hear and determine the matters referred to me by the said decree, and thereupon was attended by the solicitor for the said plaintiff, no one appearing for the said defendant against whom the said bill has been taken *pro confesso*. And I find, that at the date of this my report there is due to the said plaintiff upon his mortgage aforesaid, for principal money, the sum of —, and for principal and interest the sum of —. And I have computed subsequent interest upon the said principal money, from the date of this my report, for the period of six months thereafter, and find the same amounts to the sum of —. And I have taxed to the said plaintiff his costs of this suit, at the sum of —, which said principal money, interest, and subsequent interest, together with the said costs, amount in all to the sum of —. And I appoint the same to be paid by the said defendant to the joint credit of the said plaintiff and the registrar of this honourable court, into (*insert the name of whatever bank the plaintiff desires*) between the hours of ten of the clock in the forenoon, and one of the clock in the afternoon of the — day of — next, being six months next after the making of this my report, as by the said decree is directed.

All which I humbly certify and submit to this honourable court.

Report in foreclosure suit where subsequent incumbrancers are found, some of whom prove and some do not.

IN CHANCERY.

(Full title of cause, as follows.)

Between A. B.,

Plaintiff,

and

C. D., and E. F. and G. H., an infant under the age of twenty-one years, by J. K., his guardian (*as in the decree; if parties are made by the master, add*) by bill, and L. M. and N. O., made parties in the master's office,

Defendants.

In pursuance of the decree made in this cause, as originally entitled, bearing date the — day of — one thousand eight hundred and —, I was attended by the plaintiff's solicitor, and it appearing to me by the certificates of the sheriff and (deputy) registrar of the county of —, that L. M. and N. O., not before parties to this suit, had some lien, charge, or incumbrance upon the lands and premises embraced in the plaintiff's mortgage in the bill in this cause mentioned, subsequent thereto, and ought to be made parties, I did order that they should be made parties to this suit, according to the General Orders of this court, of February, one thousand eight hundred and fifty-eight. And it subsequently appearing to me that office copies of the said decree, on which were endorsed notices in accordance with schedule A. to the said General Orders, had been served upon each of the said parties so made, pursuant to my order as aforesaid, I proceeded to hear and determine the matters referred to me by the said decree, and thereupon was attended by the solicitors for the said plaintiff and the said infant defendant G. H., and the said defendant L. M., no one attending for the defendant N. O., though duly notified as aforesaid, nor for the defendants C. D. and E. F., against whom the said bill has been taken *pro confesso*. And I find, that at the date of this my report there is due to the said plaintiff upon his mortgage aforesaid, for principal money, the sum of —, and for principal money and interest the sum of —. (*Here state any special sums allowed to the plaintiff for taxes, or premiums of insurance, &c.*)

And I have taxed to the said plaintiff his costs of this suit at the sum of —, which said principal money and interest, (and sums paid for taxes, &c.,) together with the said costs, amount in all to the sum of —. And I further find that at the date of this my report, there is due to the said defendant L. M., under and by virtue of a writ of *fi. facias* lodged in the hands of the sheriff for the said county of —, founded on a judgment at law recovered by the said L. M. against the said defendant — on the — day of —, in the year, &c., for principal money and taxed costs at law, bearing interest, the sum of —, and for such principal money and taxed costs at law bearing interest, and interest, the sum of —. And I have allowed for costs at law incidental to the lastly mentioned judgment, not bearing interest, the sum of —, (*insert the amount allowed for fi. fas. and sheriff's fees, which should be the amount usually allowed at common law,*) and I have taxed the costs of the said defendant L. M. of this suit, at the sum of —, which said last mentioned principal money, taxed costs at law bearing interest, and interest, incidental costs at law not bearing interest, and costs of this suit amount in all to the sum of —. And I certify, that, although notified as aforesaid, the said defendant, N. O., hath not attended before me, nor proved before me any subsisting lien, charge, or incumbrance upon the lands and premises aforesaid, whereby he hath under the said general orders of this court disclaimed and is foreclosed of all interest in the said lands and premises; and I hereby declare him foreclosed accordingly. And I have settled the priorities between all the said parties to this suit who have proved claims before me as aforesaid, and find that such priorities are in accordance with the order in which the said claims are hereinbefore mentioned and set forth. And I further certify, that of the said plaintiff and the said defendants, L. M., &c., the said plaintiff and the said defendant, L. M., only having attended before me, in respect of the matters aforesaid, appear to me to be of them the only incumbrancers upon the said lands and premises embraced in the plaintiff's mortgage.

All which I humbly certify and submit to this honourable court.

Subsequent report in foreclosure suit after a decree on further directions has been obtained on the foregoing report.

(Title as in decree on further directions.)

Pursuant to the decree on further directions made in this cause, bearing date the — day of —, one thousand eight hundred and sixty —, I proceeded to hear and determine the matters thereby referred to me, and thereupon was attended by the solicitors for the said —; and I find that by my report made in this cause, bearing date the — day of — last, I reported the total sum of — to be due to the said plaintiff, of which the sum of — is principal money; and I have computed subsequent interest upon the said principal money to the day hereinafter appointed for payment, and find the same amounts to the sum of — (*insert also any sums allowed for taxes, premiums of insurance, &c., paid since the former report,*) and I have taxed to the said plaintiff his subsequent costs of this suit at the sum of —, which said subsequent interest and subsequent costs (and sums allowed for taxes, &c.,) being added to the total sum so as aforesaid reported due, they together make the sum of —. And I appoint the said last mentioned sum of money to be paid by the said defendant L. M. (*following the decree on further directions*) to the joint credit of the said plaintiff and the registrar of this honourable court into the Commercial bank of Canada at its branch agency office in the — of — (*or wherever the plaintiff desires the money to be paid*) between the hours of ten of the clock in the forenoon and one of the clock in the afternoon of the — day of — next, being — months next after the making of this my subsequent report; as by the said decree on further directions is directed.

All which I humbly certify and submit to this honourable court.

Report as to title, &c., in a suit for specific performance by vendor against widow and heirs of vendee.

Pursuant to the decree made in this cause, bearing date the — day of — last, I was attended by the solicitors for the said plaintiff and the guardian of the said infant defendants, no one attending

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before me on the part of the said defendant ——— against whom the plaintiff's bill was taken *pro confesso*, and an abstract of the title of the plaintiff to the lands and premises specified in the agreement in the bill in this cause mentioned, and a notice to object thereto within fourteen days from the day of such service having been served on the guardian of the said infant defendants, and notice of an objection to such title on the part of the said infant defendants having been given to the solicitors for the said plaintiff; and having proceeded thereon and considered the same, I find that the said plaintiff can make a good title to the said lands and premises, (g) and that such good title could have been first shewn by the said plaintiff on the ——— day of ———, in the year, &c. And I have taken an account of what is due to the said plaintiff under and by virtue of the said agreement for principal and interest in respect of the purchase money of the said lands and premises, and find that there is so due to the said plaintiff for principal money the sum of £——, and for principal money and interest the sum of £——, and for taxes paid by the said plaintiff upon the said lands and premises subsequent to the date of the said agreement, the sum of £——, and for interest thereon the sum of £——, and for postages, incurred in transmitting such taxes the sum of ———, which said sums of £——, £——, &c., in the whole amount to the sum of £——, of which the sum of £—— is principal money. And I have taxed to the said infant defendants their costs of this suit up to and inclusive of the hearing of this cause at the sum of £——, and it appearing before me that such costs have been paid by the said plaintiff to the guardian of the said infant defendants, I have added the same to the said sum of £—— found due for purchase money, &c., as aforesaid, and the same amount together to the sum of £——.

All which I humbly certify and submit to this honourable court.

Report in administration suit. (See schedule Q., p. 212, supra.)

(Full style of cause.)

(Date.) Pursuance to the decree (or order) made in this cause (as

(g) If the master report against the title, he must state the point or points in which the title is defective.

originally entitled) bearing date the — day of — last, I was attended by the solicitors for —, (except the defendant A. B., against whom the plaintiff's bill was taken *pro confesso*,) and by the solicitor for the guardian of the said infant defendants.

And I have taken the accounts and made the enquiries in the said decree directed.

And upon the first enquiry in the said decree (*or order*) mentioned, I find that the personal estate not specifically bequeathed of the said C. D., deceased, the testator in the said decree (*or order*) mentioned, come to the hand of the said E. F., (*the executor*) or to the hands of any other person or persons by his order or for his use (or which without his wilful default or neglect might have been received by him) is as follows, that is to say :

In goods.....	£0	0	0
In mortgages.....	0	0	0
In other debts.....	0	0	0
Interest on mortgages and other debts accrued or collected in cash.....	0	0	0

Amounting to the sum of.....	£0	0	0
To which I have added for rents and profits of real estate as in reference to the eighth enquiry is hereinafter mentioned.....	0	0	0

Making from personal estate, and rents and profits of real estate, the sum of.....	£0	0	0
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(*If a receiver has been appointed, and the mortgages, &c., have been handed over to him, say*) of which I find that a portion has since passed into the hands of the receiver in this cause as shown by the account filed on the — day of — last, that is to say :

Mortgages.....	£0	0	0
Notes, debts, costs, and interest.....	0	0	0
Cash in (Commercial Bank).....	0	0	0
Cash in receiver's hands.....	0	0	0
Cash in bailiff's hands for receiver.....	0	0	0

Amounting to the sum of.....	£0	0	0
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which being deducted from the said sum of (*the total amount of personally, and rents and profits as above*) the balance is the sum of —, for which the said E. F. was accountable to the estate of the said testator, and in respect of the application thereof by the said E. F., I find that the same has been as follows, that is to say:

In payment of the debts of the testator.....	£0	0	0
In disbursements and expenses necessarily incurred in and about the administration, preservation and collection of the personal estate and other payments...	0	0	0
For funeral and testamentary expenses of the said testator, of which the sum of £— was for testamentary and funeral expenses (and the sum of £— was for the cost of a monument and expenses attending the erecting and enclosing the same, which I find, considering the station in life of the testator and the amount of his property, was not, according to the evidence before me, an unreasonable expenditure)...	0	0	0
In payments to the legatees of the said testator the following sums, that is to say—(<i>set out sums paid to legatees</i>).....	0	0	0
In payments to A. A., the widow of the said testator, for the maintenance and education of the infant children of the testator as follows :—(<i>set out sums paid to the mother.</i>) (<i>If any of the children have died since the death of the testator say</i>)	0	0	0
In payments to the said A. A. for the maintenance and support, medical expenses and funeral expenses of G. H., deceased, an (infant) son of the testator.....	0	0	0
Improvements to, and taxes on, the real estate of the said testator (of which the sum of £— was for taxes)....	0	0	0
(<i>Set out here any further allowances made to the executor, such as debts converted into judgments and still uncollected, and personal estate converted into real estate, &c.</i>).....	0	0	0
Amounting in all to the sum of.....	£0	0	0

Which being deducted from the said sum of (*the amount for which E. F., the executor, was accountable*) leaves the sum of — undisposed of in the hands of the said E. F.

And upon the second enquiry in the said decree (*or order*) mentioned, I caused an advertisement to be published in certain newspapers called — for the creditors of the testator to come in and prove their debts before me by a certain day now past, or they would be peremptorily excluded from the benefit of the said decree, and in pursuance of the said advertisement (three) creditors of the said testator and his estate came in and proved their debts before me and the amounts allowed to them for principal money, interest and costs appear in schedule A. to this my report, which I find are the debts of the said testator remaining unpaid (*or if no creditors come in state the fact accordingly.*)

And in respect of the third reference in the said decree, I find that the funeral (and testamentary) expenses of the said testator (including the costs of and incidental to a monument) amount to the sum of — as hereinbefore mentioned.

And upon the fourth enquiry I find that the said testator's legacies are as set forth in schedule B. to this my report.

And upon the fifth enquiry mentioned in the said decree, I find that the parts of the personal estate of the said testator outstanding or undisposed of are as follows, that is to say :

Mortgages, notes, debts, cash, &c., in the hands of the receiver, amounting, as hereinbefore mentioned, to the sum of.....	£0	0	0
The said balance in the hands of the said E. F	0	0	0
(The hereinbefore mentioned personal estate converted into real estate valued at).....	0	0	0
(The hereinbefore mentioned sum of the judgment against X. Y. estimated at.....	0	0	0

Amounting to the sum of..... £0 0 0

Together with certain rents of real estate referred to in the receiver's account and not yet collected, and also the real estate purchased with personal estate as hereinbefore mentioned ; and the reasons

why and the circumstances under which the same are undisposed of are as hereinbefore stated under the first enquiry.

And upon the sixth and seventh enquiries mentioned in the said decree, I find that the real estate the said testator was seised of or entitled to at the time of his death, and the incumbrances which affect the same, are set forth in schedule C. to this my report.

And upon the eighth enquiry I find that the rents and profits of the said testator's real estate received by the said E. F. or by any other person or persons by his order or for his use amount to the sum of ——— hereinbefore mentioned, (and that it has not appeared before me that any part of the rents and profits of the testator's real estate has been lost by the default or neglect of the said E. F., or by any person or persons acting for him, and (or but) I find that there are rents and profits of the said testator's real estate remaining uncollected by the receiver as hereinbefore mentioned.

All which I humbly certify and submit to this honourable court.

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FORMS OF PROCEEDINGS.
[MASTER'S OFFICE—REPORT ADMINISTRATION.]

SCHEDULE A. REFERRED TO IN THE FOREGOING REPORT.

List of debts. (r)

No. of entry of claim.	Names of Creditors.	Addresses.	Amounts allowed principal, interest, & costs.	Total amounts due.
2	James Allen....	—, in the county of —, surgeon.	£ s. d. 100 0 0	£ s. d.
		Interest	4 0 0	
		Costs	2 2 0	
				106 2 0
1	Charles Cohen.	No. —, — street, in the town of —, gentleman, executor of J. Thomas.....	67 0 0	
		Interest from 5th October, 186 , at — per cent.	4 2 0	
		Costs.....	2 2 0	
5	John Dennis & Owen Thomas.	No. —, — street, city of —, grocers, and co-partners.....	100 0 0	
		Interest from 16 October, 186 , at — per cent.	5 0 0	
		Another debt....	62 0 0	
		Interest from 1st January, 186 , at — per cent.	2 10 0	
		Costs	2 4 6	
				73 4 0
				171 14 6
			Total...	£351 0 6

(r) If debts bear interest, interest is calculated accordingly; if they do not bear interest, interest is only calculated from the date of the decree. Interest on legacies is calculated from one year from the death of the testator, or from the time of payment, as directed by the will. (See Order XLII., sec. 14, *supra*, p. 200.) The above forms are framed accordingly. In all cases the interest is calculated to the date of the report.

SCHEDULE B. REFERRED TO IN THE FOREGOING REPORT.

List of legacies. (r)

No.	Name of legatees.	Descriptions.	Amount of principal and interest.			Total amounts due.		
			£	s.	d.	£	s.	d.
	James Oliver....	Son of testator, an infant.....	100	0	0			
		Interest.....	7	5	6			
	Mary Russell...	Of 20 — street, city of —...	50	0	0	107	5	6
		Interest from 1 January, 186 .						
		The death of testator, (if so)...	4	8	0			
	Jane, the wife of John Williams.....	Of the — of —, in the county of —, Esquire.	250	0	0	54	8	4
		Paid on account.	50	0	0			
		Interest..	200	0	0			
			14	11	0			
						214	11	0
		Total...	£376	4	10			

SCHEDULE C. REFERRED TO IN THE FOREGOING REPORT.

An account of what real estate the said testator was seised of or entitled to at the date of his death, and whether any incumbrances affect the same.

Lot 20 on the east side of — street, in the — of — and county of —, containing 50 acres more or less. (*Give full particulars as to buildings, soil, condition of lot, and incumbrances, if any.*)
(*Go through all the real estate in the same way.*)

(If there are no incumbrances on any of the lots, say after going through the lots, "there were no incumbrances existing on any of the real estate at the time of the death of the said testator, except the dowry of his widow, the said A. A., neither have any been incurred since, except for taxes," or as the facts may be.)

MISCELLANEOUS FORMS.

Form of a certificate of lis pendens.

I certify that in a suit or proceeding in Chancery, between John Smith, plaintiff, and John Styles, defendant, some title or interest is called in question in the following lands, that is to say, (*describing them.*) And at the request of the said plaintiff, this certificate is given for the purpose of registration, pursuant to the statute in such case made and provided.

Given under my hand, and the seal of the said court, (or seal of office,) this — day of — A.D. 18—.

— Registrar.

Form of a certificate of the state of cause.

IN CHANCERY.

Tuesday the — day of January, A.D. 186 .

(*Full style of cause.*)

This is to certify that the plaintiff filed — bill in this cause, on the — day of —, 186—, (*as the entries are in the registrar's book of causes.*) Since which no further proceeding has been taken in this cause, as by my books appear.

— Registrar.

Form of a certificate of a final order of foreclosure.

IN CHANCERY.—This is to certify, that by a final order of foreclosure, bearing date the — day of —, one thousand eight hundred and —, and made by the said court in a certain cause pending therein, wherein John Smith is plaintiff, and John Styles is defendant, it was ordered that the said defendant, John Styles, should stand absolutely debarred and foreclosed of and from all right, title, and equity of redemption of, in, and to the mortgaged premises, in the pleadings in the said cause mentioned, being (*describing them as in bill.*) And at the request of the said plaintiff this certificate is given, for the purpose of registration, pursuant to the statute in such case made and provided.

Given under my hand and the seal of the said court, this — day of —, A.D. 186 .

— Registrar.

Form of a subpæna.

CANADA.

IN CHANCERY.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To (A. B., C. D. and E. F.,) greeting: We command you, (and each of you,) that, laying all other matters aside, and notwithstanding any excuse, you personally be and appear before (one of the judges of our court, at the court house, at —, in the county of —, on the — day of —, A.D. 186 , at the hour of ten o'clock in the forenoon, and so on from day to day until the suit hereinafter mentioned is disposed of) to testify the truth according to your knowledge in a certain suit now pending in our Court of Chancery, wherein G. H. is plaintiff, and J. K. is defendant, on the part of the (plaintiff or defendant, as the case may be;) (in the case of subpæna duces tecum, add, "and that you then and there bring with you and produce.") And herein fail not at your peril. Witness, the Honourable PHILIP MICHAEL MATTHEW SCOTT VANKOUGHNET, our Chancellor, this — day of — 186 , in the — year of our reign.

L. M., — Solicitor, Toronto, C. W.

— Registrar.

Form of fi. fa. for costs.

CANADA.

IN CHANCERY.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of the —, greeting:

We command you, that of the goods and chattels of John Styles in your bailiwick, you cause to be made the sum of twenty pounds for certain costs which were lately before us in our Court of Chancery, in a certain cause wherein John Smith is plaintiff, and John Styles is defendant, by an order (or decree) of our said court, bearing date the — day of —, ordered to be paid by the said John Styles to the said John Smith, and which costs have been

taxed and allowed by the master of our said court, — at the sum of twenty pounds, as appears by the certificate of the said master, dated the — day of —, together with interest on the said sum of twenty pounds, at the rate of six per centum per annum, from the — day of —. And that you have that money and interest before us, in our said court, immediately after the execution hereof, to be paid to the said John Smith, in pursuance of the said order, (or decree,) and in what manner you shall have executed this our writ make appear to us in our said court immediately after the execution thereof. And have there then this writ.

Witness the Honourable PHILIP MICHAEL MATTHEW SCOTT VAN-ROUGHNET, our Chancellor, this — day of —, A.D. 18—, in the twenty — year of our reign.

— Registrar.

(*Endorsement on back of foregoing.*)

BY THE COURT.

Levy £— and interest at £6 per centum per annum, from the — day of —, until payment, together with £— for this writ, warrant thereon, &c., besides officers' fees, sheriff's poundage, and all other legal incidental expenses.

This writ is issued by — of —, solicitor for the said —.

The within — named is a merchant, and resides at — in your bailiwick.

Form of a fi. fa. for debt and costs.

CANADA.

IN CHANCERY.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith. To the sheriff of the —, greeting :

We command you that of the goods and chattels of — in your bailiwick, you cause to be made the sum of —, which said sum of money was lately before us in our Court of Chancery in a certain — by a — of our said court, bearing date the — day of — ordered to be paid by the said — to —, together with certain costs in the said — mentioned, and which

costs have been taxed and allowed by the master of our said court, — at the sum of — as appears by the certificate of the said master dated the — day of —, and that of the said goods and chattels you further cause to be made the said sum of — together with interest at the rate of six per centum per annum, on the said sum of — from the — day of —, and on the said sum of — from the — day of —. And that you have that money and interest before us, in our said court immediately after the execution hereof, to be paid to the said — in pursuance of the said —, and in what manner you shall have executed this our writ make appear to us in our said court immediately after the execution thereof. And have there then this writ. Witness the Honourable PHILIP MICHAEL MATTHEW SCOTT VANKOUGHNET, our Chancellor, this — day of —, A. D. 18—, in the twenty — year of our reign.

—, Registrar.

(Endorsement on the foregoing.)

BY THE COURT.

Levy £— and interest at £6 per centum per annum from the — day of — until payment, together with £— for this writ, warrant thereon, &c., besides officers' fees, sheriff's poundage, and all other legal incidental expenses.

This writ is issued by — of —, solicitor for the said —.

The within named — is a merchant, and resides at — in your baliwick.

Form of writ of arrest.

CANADA.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, defender of the faith. To the sheriff of —, greeting:

Whereas it is represented to us, in our Court of Chancery, on the part of —, complainant, against —, defendant, that he the said defendant is greatly indebted to the said complainant, and designs quickly to go into other parts beyond this province, (as by

oath made in that behalf appears,) which tends to the great prejudice and damage of the said complainant: therefore, in order to prevent this injustice, we do hereby command you that you do, without delay, cause the said — personally to come before you, and give sufficient bail or security, in the sum of —, that the said — will not go, or attempt to go into parts beyond this province, without leave of our said court. And in case the said — shall refuse to give such bail or security, then you are to commit him the said — to prison, there to be kept in safe custody until he shall do it of his own accord: and when you shall have taken such security, you are forthwith to make and return a certificate thereof to us, in our said Court of Chancery, distinctly and plainly, under your hand together with this writ.

Witness, the Honourable — our Chancellor, at Toronto, this — day of —, 18—, and in the — year of our reign.

—, Registrar.

—, Plaintiff's Solicitor.

Form of writ of injunction.

CANADA.

IN CHANCERY.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To (A. B., his servants, workmen, and agents, or as the case may be) greeting:

Whereas it has been represented to us, in our Court of Chancery, on the part of — complainant, that he hath lately filed — bill of complaint in our said Court of Chancery, against you the said —, to be relieved touching the matters therein complained of, in which bill it is stated, among other things, that your actings and doings in the premises are contrary to equity and good conscience. We therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you the said — and the persons before mentioned, and each and every of you, under the penalty of five thousand pounds, to be levied upon your lands, goods, and chattels, to our use, that you do absolutely desist and refrain from (*follow order for injunction.*)

Witness, the Honourable PHILIP MICHAEL MATTHEW SCOTT VANKOUGHNET, our Chancellor, this — day of —, 18—, in the — year of your reign.

—, Plaintiff's Solicitor.

—, Registrar.

Form of writ of attachment.

CANADA.

IN CHANCERY.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of the —, greeting: .

We command you, that you attach — so as to have — body before our Chancellor, in our Court of Chancery of Upper Canada, at Toronto, at the expiration of fifteen days after the execution hereof, there to answer unto us as well touching the contempt which — as is alleged, hath committed against us, as also such other matters as shall then and there be laid to — charge, and further to perform and abide such order as our said court shall make in this behalf. And have you then there this writ; and make and return a certificate under your hand, of the manner in which you shall have executed the same. Witness, the Honourable PHILIP MICHAEL MATTHEW SCOTT VANKOUGHNET, our Chancellor, this — day of — 18—, in the — year of our reign.

—, Solicitors.

—, Registrar.

Form of writ of sequestration.

CANADA.

IN CHANCERY.

Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. To the sheriff of the —, greeting:

Whereas (*recite Order.*) Know ye therefore, that we, in confidence of your prudence and fidelity, have given and by these presents do give unto you, full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said

——, and to collect, receive and sequester into your hands not only all the rents and profits of —— said messuages, lands, tenements, and real estate, but also all —— goods, chattels and personal estate whatsoever. And therefore we command you that you do at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements and real estate of the said ——, and that you do collect, take and get into your hands, not only all the rents and profits of —— said real estate, but also all —— goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands until the said —— shall clear —— contempt, and our said court, make other order to the contrary. Witness the Honourable PHILIP MICHAEL MATTHEW SCOTT VANKOUGHNET, our Chancellor, this —— day of ——, 18—, in the twenty —— year of our reign.

Writ of assistance.

Victoria, &c.,

To the sheriff of the county (or united counties) of ——, as well present as for the future, greeting: Whereas according to the tenor and true meaning of an order made in a certain cause depending in our court of Chancery for Upper Canada, between A. B., complainant, and C. D., defendant, the said C. D. was ordered and enjoined to deliver up possession to ——, in the said order named, of all (*description of property as in the order,*) yet nevertheless he, the said C. D., and other ill disposed persons his accomplices, have refused to pay obedience thereto, and detain and keep possession of the said premises in manifest contempt of us and of our said court. Know ye therefore, that we being willing and desirous that justice should be done to the said A. B. in this behalf do give you full power and authority to place and put the said A. B., or his assigns, without delay into the full, peaceable, and quiet possession of all and singular the said premises with their appurtenances, and from time to time as often as there shall be or may be occasion to maintain and keep him and his assigns in such peaceable and quiet possession, according to the intent and true meaning of the said order of our said court; and therefore we do hereby command and enjoin you

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that immediately after your receipt of this writ you do go and repair to and enter into and upon the said premises, and that you do remove, eject, and expel the said C. D., his tenants, servants, and accomplices, each and every of them out of and from the said premises, and every part and parcel thereof, and that you do place and put the said A. B., and his assigns, into the full, peaceable and quiet possession thereof, and defend and keep them and their assigns in such peaceable and quiet possession, when and as often as any interruption may or shall from time to time be given or offered to them or any of them, according to the true intent and meaning of the said order, and herein you are not in anywise to fail.

Witness the Honourable PHILIP MICHAEL MATTHEW SCOTT VAN-ROUGHNET, our Chancellor, this — day of — 18—, in the — year of our reign.

Bond for security for costs. (s)

Know all men by these presents that we A. B., of the — of — in the county of —, Esquire, and C. D., of the — of — in the county of —, Esquire, are jointly and severally held and firmly bound unto E. F., Esquire, the (*deputy*) registrar of the Court of Chancery of Upper Canada (at — *the place where the bill is filed*) in the penal sum of one hundred pounds, (*or whatever sum is fixed by the order,*) of lawful money of Canada, to be paid to the said E. F., his certain attorney, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, and each of us, our, and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, dated this — day of —, in the year, &c.

Whereas X. Y., plaintiff, filed his bill of complaint in the said Court of Chancery for Upper Canada, against G. H. and J. K.,

(s) Sec. 6 of Order XLIII. *supra*, p. 211, requires all the defendants to be included in the same bond.

The execution should be verified by affidavit and the sureties must justify, if required, in double the amount of the penalty.

defendants, touching certain matters therein contained; now the condition of the hereinbefore written obligation is such that if the above bounden A. B. and C. D. or either of them, their or either of their heirs, executors or administrators, do, and shall well and truly pay or cause to be paid all such costs as the said court shall think fit to award to the said defendants, or either of them in the said cause, then the above written obligation is to be void, otherwise to remain in full force and effect.

A. B. [L.S.]

C. D. [L.S.]

Signed, sealed and delivered, in presence of,

Receiver's recognizance.

A. B., of the — of —, in the county of —, Esquire, (*the receiver*) C. D., of, &c., and E. F., of, &c., do acknowledge themselves, and each of them doth acknowledge himself to owe to X. Y., the master of the Court of Chancery of Upper Canada (at —) the sum of — pounds lawful money of Canada, to be paid to the said X. Y., his executors or administrators, and unless they do pay the same they, the said A. B., C. D., and E. F., are willing and do grant, and each of them is willing and doth grant for himself, his heirs, executors and administrators, that the said sum of — pounds shall be levied, recovered and received of and from them, and each of them, and of and from all and singular the lands, tenements and hereditaments, goods and chattels of them and each of them wherever the same shall or may be found. Witness, &c.

Whereas by an order of the Court of Chancery for Upper Canada, made in a cause wherein G. H. is plaintiff, and J. K. is defendant, and bearing date the — day of —, in the year, &c., it was ordered that it be referred to the said master (at —), to appoint a proper person to receive (*the rents and profits of the real estate, and collect and get in the outstanding personal estate of L. M. in the said order named, and to allow him a salary for his care and trouble therein; such person so to be appointed, first giving security to be approved of by*

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the said master, or as the case may be, following the order.) And whereas the said master (at —) hath approved of and appointed the said A. B. as a proper person to be such receiver, and hath approved of the above bounden C. D. and E. F., as sureties for the said A. B., and hath also settled and approved of the hereinbefore written recognizance with the hereinafter written condition as a proper security to be entered into by the said C. D. and E. F., pursuant to the said order and general orders of the said court in that behalf; and in testimony thereof hath signed an allowance in the margin hereof.

Now the condition of the hereinbefore written recognizance is such, that if the said A. B. do and shall duly account for all and every the sum and sums of money which he shall so receive (*on account of the rents and profits of the said real estate, and in respect of the personal estate of the said L. M.,* or as the case may be,) at such periods as the said master shall appoint, and do and shall duly pay the balances which shall from time to time be found to be due from him as the said court or master hath or shall hereafter direct, then the hereinbefore written recognizance shall be void and of none effect, otherwise to be and remain in full force and virtue.

Taken and acknowledged by the above named, &c.

A. B. [L.S.]

C. D. [L.S.]

E. F. [L.S.]

In the margin, the following should be written :

"G. H. v. J. K.

I have settled, approved of, and allowed this recognizance.

Dated the — day of —, 1863."

N. O., master (at —.)

The above form is adapted from the English regulations of 8th August, 1857. The recognizance should be taken and acknowledged before a commissioner for taking affidavits. The sureties should justify in double the amount of the annual value of the estate. For form of affidavit of justification, see *supra*, p. 361.

Power of attorney to receive money directed to be paid at a specified time and place.

IN CHANCERY.

(Full style of cause.)

Know all men by these presents that I, the above named A. B., do hereby nominate, constitute, and appoint E. F. of the — of —, in the county of —, gentleman, my true and lawful attorney, for me and in my name to demand and receive from the above named defendant C. D., and all and every other person and persons whom it may concern, the sum of £—, being the sum reported due to me for principal interest and cost (*or as the case may be*) and directed to be paid to me by the master's report made in this cause and dated the — day of —, in the year, &c., and upon payment thereof to make and give receipts, acquittances and other discharges for the same, and to do all acts necessary to the premises as fully and effectually as I myself could do the same if personally present, and for the purposes aforesaid to appoint any substitute or substitutes, and such substitution at pleasure to revoke. In witness whereof I have hereunto set my hand and seal this — day of —, in the year, &c. (t)

A. B. [L. s.]

Signed, sealed, and delivered in presence of G. H.

Certificate of bank manager as to non-payment of mortgage money. (u)

IN CHANCERY.

(Short style of cause.)

I, A. B., of the — of —, in the county of —, manager (*or cashier*) of the (Commercial Bank of Canada) at its branch or agency office in the — of —, do hereby certify that the above named defendant C. D. hath not, nor hath nor have any person or persons

(t) The usual affidavit of execution should be annexed.

(u) The signature by the manager on the day of the date of the certificate should be verified by affidavit, which should also show that the person signing is the manager or the cashier, as the fact may be, of the bank or agency on behalf of which he signs the certificate. The certificate should bear as late a date as practicable.

at a specified

named A. B.,
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and lawful attor-
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A. B. [L. S.]

of mortgage

—, manager (or
branch or agency
the above named
person or persons

the certificate should
son signing is the
on behalf of which
as practicable.

FORMS OF PROCEEDINGS.
[MISCELLANEOUS.—CONVEYANCE UNDER DECREE FOR SALE.]

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on his behalf at any time before and up to the date of this certi-
ficate paid into or tendered at the said bank at its said branch or
agency to the credit of the above named plaintiff, E. F., or to the
joint credit of the said plaintiff and the registrar of this honourable
court, the sum of £—, or any part thereof.

Dated at —, this — day of —, in the year, &c.

A. B., Manager, (or Cashier.)

Witness, C. D.

Conveyance under a decree for sale of mortgaged premises.

This Indenture, made the — day of —, in the year, &c.,
between A. B. (*the mortgagee*) of the — of —, in the county
of — and province of Canada, (Esquire,) of the first part, and C.
D. of, &c., (*the purchaser*), of the second part. WHEREAS one E.
F. (*the mortgagor*) being seised in fee simple of the lands and pre-
mises hereinafter described and conveyed, or intended so to be, did
by a certain indenture of bargain and sale, by way of mortgage,
bearing date the — day of —, in the year, &c., convey the
said lands and premises to the said A. B. for the purpose of secur-
ing the re-payment by the said E. F. of the several sums of money
and interest thereon on such days and times as in the said inden-
ture are particularly mentioned and set forth. AND WHEREAS the
said principal sum, so secured by the said indenture as aforesaid,
and the interest thereon, were respectively not paid at the time
appointed by the said indenture for payment thereof.

AND WHEREAS the said A. B. filed his bill of complaint in the
Court of Chancery for Upper Canada on the — day of —, in
the year, &c., against the said E. F., (and *naming the other parties*,
if any), to obtain payment of the amount of principal money and
interest due to him upon the security of the said indenture of mort-
gage as aforesaid. AND WHEREAS by a decree of the said Court of
Chancery, bearing date the — day of —, in the year, &c., it
was, amongst other things, ordered that it be referred to the master
of the said court (at —) to enquire and state whether any person
or persons, and who, other than the said A. B., had any lien, charge
or incumbrance upon the said lands, and in case the said master

should find that any person or persons, other than the said A. B., had any lien, charge or incumbrance, then he was to cause such person or persons to be served with process under the general orders of the said court in that behalf, and proceed to take an account of what was due to the said A. B., and to such other incumbrancer or incumbrancers, if any, for principal money and interest, and to tax to them their costs, and also to settle their priorities; and upon the said E. F. paying to the said A. B. and such other incumbrancer or incumbrancers (if any) what should be found due to them respectively for principal money and interest, and costs, within six months after the said master should make his report, at such time and place as the said master should appoint, it was ordered that the said A. B., and such other incumbrancer or incumbrancers should assign and convey the said premises free and clear of all incumbrances done by him or them, and should deliver up all deeds and writings in his or their or either of their custody or power relating thereto upon oath, or enter up satisfaction on the roll in respect of their respective judgments, as the case might be, and in default of the said E. F. making such payments by the time aforesaid, it was ordered that the said lands should be sold with the approbation of the said master, who was to settle the conveyance or conveyances to the purchaser or purchasers thereof, and it was further ordered that the purchaser or purchasers should pay his, her or their purchase money into the Commercial Bank of Canada, at its branch or agency office in the city of Toronto, in the name and with the privity of the registrar of the said court, and that the same, when so paid in, should be applied in payment of what should be found due to the said A. B., and such other incumbrancer or incumbrancers according to their respective priorities.

AND WHEREAS the said master, in pursuance of the said decree, duly made his report in writing, bearing date the — day of —, in the year, &c., and thereby reported, amongst other things, that the said A. B. was an incumbrancer on the said lands in the sum of money in the said report mentioned, and he thereby appointed the — day of —, in the year, &c., for payment by the said E. F. to the said A. B. of the said sum so reported due to him as afore-

said, and that there were no other incumbrances proved before him.

AND WHEREAS default was made in payment by the said E. F. of the said sum so reported due by him as aforesaid, on the day and time in the said report appointed for payment thereof.

AND WHEREAS, by an order of the said Court of Chancery, bearing date the — day of —, in the year, &c., made in the said cause, it was ordered that the said premises should be sold in pursuance of and in manner directed by the said decree of the said — day of —, in the year, &c. AND WHEREAS, in pursuance of the said order and decree, the said premises were under and subject to certain conditions of sale, with the approbation of the said master, offered for sale by public auction at the (town) of —, in the said county of —, on the — day of —, in the year, &c., at which sale the said C. D., being the highest bidder for the same, became and was duly declared the purchaser thereof, at and for the sum or price of —, lawful money of Canada. And the said master by his report, bearing date the — day of —, in the year, &c., certified that the said E. F. had been so declared to be the highest bidder for and had become the purchaser of the said lands, at and for the said sum or price. AND WHEREAS, the said last mentioned report has been duly filed in the said court, and the said sale stands duly confirmed according to the general orders and practice of the said court. AND WHEREAS the said C. D. hath paid the said sum of £—, being the amount of his said purchase money, into the Commercial Bank of Canada, in accordance with the terms of the said decree and the said conditions of sale. AND WHEREAS the said master hath settled and approved of the draft of these presents, as testified by his signature on each page of the engrossment thereof. NOW THIS INDENTURE WITNESSETH, that in pursuance of and in obedience to the said decree, and in consideration of the premises, and of the said sum of —, so paid into the said Commercial Bank, as aforesaid; and also, in consideration of the sum of one dollar, paid to the said A. B. by the said C. D., the receipt whereof is hereby acknowledged, he the said party hereto, of the first part, hath according to his estate and interest in the said



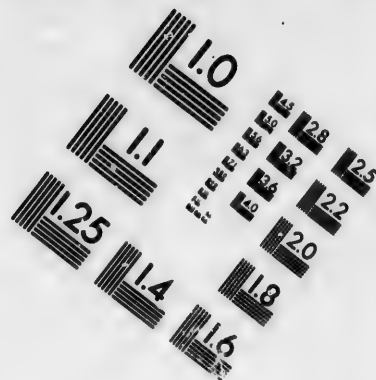
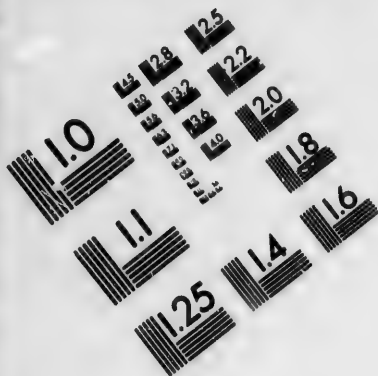
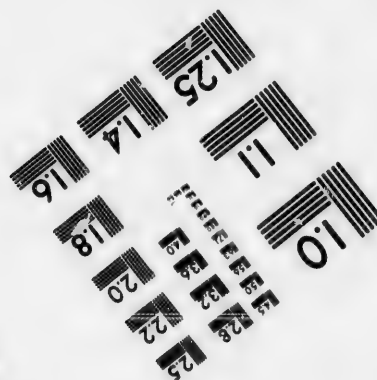
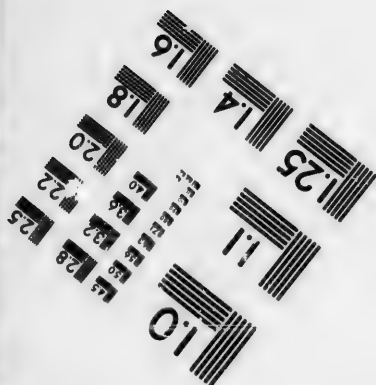
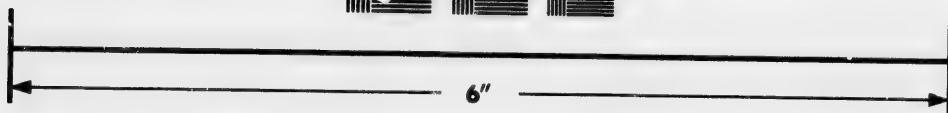
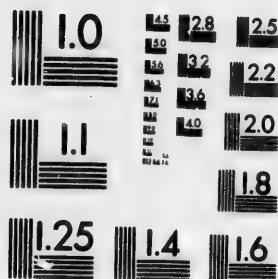


IMAGE EVALUATION TEST TARGET (MT-3)



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lands, granted, bargained, sold, aliened, released, transferred, conveyed, and assured, and by these presents doth grant, bargain alien, sell, release, transfer, convey and assure unto the said C. D., his heirs and assigns, all, &c., (*description*), and all the estate, right, title, and interest, both at law and in equity, of him the said party hereto of the first part, of, in, to, and out of the said lands, or any part thereof. TO HAVE AND TO HOLD the said lands, with the rights, members, and appurtenances thereof, unto the said C. D., his heirs and assigns, to, and for his and their sole use, benefit, and behoof for ever. AND the said party hereto of the first part, hereby covenants, for himself, his heirs, executors and administrators, with the said C. D., his heirs and assigns, that he hath not done or been party or privy to any act whereby the said lands now, or can, shall, or may be in any wise incumbered, or prejudicially affected in title, estate,¹ or otherwise, howsoever. In witness whereof, &c.

BILLS OF COSTS.

IN CHANCERY.

(*Title of cause.*)

The bill of costs of the above named plaintiff (*or defendant as the case may be*) taxed under decree (*or order*) bearing date the — day of —.

Costs of a demurrer allowed.

	s.	D.
Instructions for demurrer.....	10	0
Drawing same, (<i>per folio</i>).....	1	0
Paid counsel to settle.....	10	0
Attending him with and for	2	6
Engrossing demurrer, (<i>per folio</i>).....	0	6
Attending to file.....	1	8
Paid filing.....	8	0
Notice thereof, copy and service.....	2	9
Office copy being demanded, preparing same, and paid (<i>per folio</i>).....	0	6
Attending to examine.....	1	8

FORMS OF PROCEEDINGS.
[COSTS OF DEMURRER ALLOWED.]

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Attending to deliver.....	1	3
Instructions for brief.....	5	0
Drawing same, bill and demurrer, (<i>per folio</i>).....	0	6
Observations, (<i>per folio</i>).....	1	0
Præcipe to set down for argument and attending.....	1	3
Paid setting down.....	2	6
Notice of setting down, copy and service... ..	2	9
Copy to annex to brief.....	1	0
Paid counsel with brief to argue.....		
Attending him with and for.....	2	6
Attending court, (<i>where solicitor not also counsel</i>), demurred, argued, judgment reserved.....	5	0
Attending to hear judgment, demurrer allowed.....	5	0
Attending registrar to draw order.....	1	3
Minutes, (<i>per folio</i>).....	1	0
Notice to settle and pass, copy and service.....	3	0
Attending to settle and pass.....	5	0
Paid for.....(<i>as paid.</i>)		
Attending for, entered	1	3
Fee on.....	5	0
Copy to serve.....	1	6
Service.....	1	3
Copy for master.....	1	6
Attending to file.....	1	3
Attending for warrant to tax costs.....	1	3
Copy.....	0	6
Service	1	3
Bill of costs and attending taxation.....	5	0
Attending for certificate... ..	1	3
Postages.....(<i>as paid.</i>)		
Paid master's fees throughout.....(<i>as paid.</i>)		

Costs of demurrer over-ruled.

Having received notice of filing demurrer, attending to search	1	3
Paid.....	1	0
Demand of office copy, copy and service.....	2	9

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N. D.
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..... 2 9
(*per*
..... 0 6
..... 1 3

Perusing demurrer.....	5	0
Attending to search demurrer set down.....	1	3
Paid.....	1	0

If not set down by defendant, add,

Præcipe to set down.....	1	3
Paid.....	2	6
Notice thereof, copy and service.....	2	9
Instructions for brief.....	5	0
Drawing same, (<i>per folio</i>).....	0	6
Copy notice to annex.....	1	0
Observations or other original matter, in brief, (<i>per folio</i>)...	1	0
Paid counsel fee.....		
Attending him with and for.....	2	6
Attending court (<i>where solicitor not also counsel</i>).....	5	0
Attending court to hear judgment.....	5	0
Attending registrar to draw order.....	1	3

(Continue as in the preceding form.)

Interlocutory motion in chambers, refused.

On being served with notice of motion, attending seaching affidavits.....	1	3
Paid.....	1	0
Demand of office copies thereof—copy and service,	2	9
Drawing affidavit in reply, folio 5.....	5	0
Engrossing	2	6
Attending to swear.....	1	3
Oath.....	1	5
Attending to file.....	1	3
Paid.....	0	4
Attending chambers on motion, adjourned at request.....	5	0
Office copy affidavit in reply, to serve, same being demanded	2	6
Attending to examine and deliver.....	2	6
Counsel fee on motion—refused, (<i>when counsel attend.</i>).....	10	0
Attending registrar to draw order.....	1	3

(Continue as in the preceding form.)

Bill of costs of creditor proving claim.

(On a mortgage.)

Instructions to prove claim.....	10	0
Drawing affidavit, fo. 4.....	4	0
Engrossing ..	2	0
Attending to swear.....	1	3
Oath.....	1	4
Marking exhibits (each).....	1	0
Drawing statement of claim and fair copy.....	5	0
Bill of costs.....	5	0
Attending to bring in.....	1	3
Attending to hear and determine (each hour) (v).....	5	0
Attending to settle report.....	5	0
Paid master's fees.....	(as paid.)	

(On a judgment.)

Instructions to prove claim.....	10	0
Attending to search judgment.....	1	3
Paid... ..	(as paid.)	
Attending to bespeak and for exemplification.....	2	6
Paid for.....	(as paid.)	
Drawing affidavit, fo. 3.....	3	0
Engrossing ..	1	6

(And other items as in preceding form.)

Costs of obtaining a final order of foreclosure.

Attending searching money paid....	1	3
Drawing affidavit by plaintiff, fo. 4.....	4	0
Engrossing.....	2	0
Attending to swear.....	1	3
Oath	1	4
Drawing certificate by bank manager	2	0
Copy	1	0
Attending to see signed.....	1	3

(v) The creditor is only entitled to costs for attending on his own claim.

Drawing affidavit of verification.....	2	0
Engrossing.....	1	0
Attending to swear.....	1	3
Oath	1	0
Attending to file	1	3
Paid filings.....	(as paid.)	
Attending moving final order	5	0
Attending registrar to draw order	1	3
Paid for order.....	(as paid.)	
Attending for, entered.....	1	3
Fee on	5	0
Attending bespeaking, and for certificate.....	2	6
Drawing and copy præcipe for registrar	3	0
Paid for certificate.....	5	0
Attending to register.....	1	3
Paid registration fees.....	5	0

Costs of motion for injunction considered as an interlocutory application.

Drawing affidavit of A. B. in support of motion (<i>per folio</i>)..	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to swear.....	1	3
Oath (1d. <i>per folio</i> and 1s).....		
Marking exhibits (<i>each</i>).....	1	0

(For each additional affidavit, charge as above.)

Attending to file affidavits	1	3
Paid (<i>each</i>).....	0	4
Drawing special notice of motion for injunction (<i>per folio</i>)..	1	0
Copy (<i>per folio</i>).....	0	6
Service (<i>if by solicitor</i>).....	1	3
Affidavit and attending to swear	2	0
Oath.....	1	0

(If served by sheriff.)

Attending sheriff with and on return	2	6
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Paid sheriff (as paid.)
Instructions for brief on motion 5 0
Brief pleadings, (when not costs in the cause) (per folio) ... 0 6
A second brief pleadings, brief affidavits and exhibits for
second counsel (if two counsel fees and brief plead-
ings and affidavits allowed by order of judge, but not
otherwise) (per folio). (w) 0 6
— copies notice motion, to annex (per folio) 0 6
Attending (each) counsel with brief, and for 2 6
Paid fees (as per fiat of judge.) (x)
Attending court, interim injunction, granted (if solicitor not
counsel) 5 0
Attending registrar to draw order 1 3
Paid for (as paid.)
Attending for, entered 1 3
Fee on 5 0

If order served.

Copy order to serve (per folio) 0 6
Service (following the fees for service of notice of
motion)
Præcipe and attending to bespeak and for, writ of injunction 2 6
Paid 7 6
Fee on 5 0
Copy (each) (per folio) 0 6

(Service, same charges as for service of notice of motion.)

Drawing notice of motion for injunction absolute (per folio) 1 0

(Copy and service as before.)

Demand having been served for office copies affidavits filed
by plaintiff, making same (per folio) 0 6
Attending to examine (each) 1 3
Attending to deliver 1 3

(w) The first counsel is presumed to use the drafts and office copies of the affidavits, and therefore a brief of the pleadings is only taxable for him.

(x) If consultation had, charge fees therefor. To each counsel 25s., and solicitor's attendance 5s. each hour.

Having received notice of cross-examination of deponents to affidavits filed by plaintiff, attending special examiner thereon (<i>each hour</i>).....	5	0
Attending to bespeak and for office copy depositions.....	2	6
Paid for	<i>(as paid.)</i>	
Having received notice of filing affidavits in answer; attending searching.....	1	3
Paid	1	0
Demand of office copies, copy and service	2	9
Attending court (motion ordered to stand over for a week to enable plaintiff to file affidavits in reply, and to cross-examine defendant's witnesses, counsel for defendant undertaking to produce same).....		
<i>(Counsel fees thereon and attendances as before.)</i>		
Perusing affidavits filed by defendant.....	5	0
Attending special examiner to bespeak and for appointment to cross-examine defendant's witnesses.....	2	6
Drawing appointment and copy.....	1	6
Copy and service on defendant's solicitor	1	9
Attending special examiner cross-examining (<i>each hour</i>)..	5	0
Attending to bespeak and for office copy depositions	2	6
Paid fees to special examiner.....	<i>(as paid.)</i>	
Drawing affidavit of A. B. in reply (<i>per folio</i>).....	1	0
<i>(Charge for each affidavit as before.)</i>		
Attending to file affidavits.....	1	3
Paid filings (<i>each</i>).....	0	4
Brief of affidavits filed in answer and in reply, and all depositions, (<i>if two counsel certified for by judge</i>), (<i>per folio</i>)	0	6
Fees to counsel, &c., (<i>as before</i>).....		
Attending court (injunction dissolved on grounds of suppression of material fact by plaintiff, (<i>or as case may be</i> .) (<i>For defendant's costs thereon, see infra.</i>).....		
Attending court, injunction continued to hearing.....	5	0
Attending registrar to draw order	1	3
Notice to settle and pass copy and service	3	0
Attending thereon	5	0
<i>(Charges on order and injunction, as before.)</i>		

(Bill of costs of cause, pro confesso.)

Instructions for suit.....	10	0
Letter to defendants, (each).....	2	6
Paid postage	(as paid.)	
Letter to registrar	2	6
Paid postage.....	(as paid.)	
Paid postage on letter from registrar.....	"	
Remitted fees	"	
Paid postage.....	"	
Drawing bill (not exceeding 20 folios, including copy to keep) (a)	20	0
Fee to counsel to settle and sign (b).....	10	0
Attending with and for.....	2	6
Engrossing bill (per folio).....	0	6
Attending to file.....	1	3
Paid filing.....	15	0
Præcipe for certificate <i>lis pendens</i> , and attending to bespeak, (to be allowed only where certificate actually and necessarily taken out and registered)	1	3
Attending for.....	1	3
Paid.....	(as paid.)	
Attending to register.....	1	3
(Or) Letter to registrar of the county of —, therewith to register (as the case may be).....	2	6
Postage	(as paid.)	
Fee for registration.....	5	0
Office copies bill (per folio) (c)	0	6

(a) For every additional folio above 20, (to be allowed in the discretion of the master,) including copy to keep, per folio, 1s. No greater sum than 30s. to be taxed by the master for drawing any bill without the special direction of one of the judges of the court, upon the application of the solicitor requiring the same, for which application no charge is to be made. A folio is 100 words in conveyancing as well as Chancery.

(b) Between party and party, 10s. only is allowed, and the master has no discretion to allow a larger fee. Between solicitor and client, 1s. for every folio in addition to the 10s. is taxable as fee to counsel to settle pleadings.

(c) This includes 1d. per folio paid registrar for examining and making office copy.

Attending to examine (<i>each</i>).....	1	3
Paid for certificates (<i>each</i>).....	8	9
Endorsing office copies (<i>each</i>).....	2	0

(On bills for foreclosure and redemption substitute for last item.)

Drawing special endorsement, (<i>per folio</i>).....	1	0
Engrossing on each office copy, (<i>per folio</i>).....	0	6
Attending sheriff with office copy, <i>or</i>	1	3
Letter to him with.....	2	6
Paid postage.....	(<i>as paid.</i>)	
Affidavit of service (<i>d</i>).....	2	0
Attending to stamp affidavit (<i>e</i>)	1	3
Attending return (<i>f</i>)	1	3
Paid postage	(<i>as paid.</i>)	
Paid sheriff	“	
Postage on remitting.....	“	
Attending searching answer and paid.....	2	3
Attending to file affidavit and paid.....	1	7
Præcipe for order <i>pro. con.</i> and attending.....	1	3
Paid for order	(<i>as paid.</i>)	
Attending for, entered.....	1	3
Fee on.....	5	0
Præcipe for order to produce and attending (<i>if taken out</i>)..	1	3
Paid for order.....	(<i>as paid.</i>)	
Attending for, entered.....	1	3
Fee on.....	5	0
Copy and service	2	3
Defendant having absconded, drawing affidavit to support application to serve him by publication (<i>per folio</i>).....	1	0
Engrossing, (<i>per folio</i>).....	0	6
Attending to swear.....	1	3

(*d*) Where several defendants are or can conveniently be served by the same person, only one affidavit of service on such defendants will be allowed.

(*e*) Only one attendance to stamp affidavits should be allowed.

(*f*) Not allowed where papers returned by letter through the post.

..... 1 3
..... 3 9
..... 2 0

last item.)

..... 1 0
..... 0 6
..... 1 3
..... 2 6
..... (as paid.)
..... 2 0
..... 1 3
..... 1 3
..... (as paid.)
..... "
..... "
..... 2 3
..... 1 7
..... 1 3
..... (as paid.)
..... 1 3
..... 5 0
..... t).. 1 3

..... (as paid.)
..... 1 3
..... 5 0
..... 2 3
sup-
tion

..... 1 0
..... 0 6
..... 1 3

the same per-

Oath.....

(And for each further necessary affidavit, similar charges.)

Attending to file affidavits..... 1 3
Paid.....(as paid.)
Attending chambers, moving order..... 5 0
Attending registrar with papers..... 1 3
Paid for order.....(as paid.)
Attending to obtain, entered..... 1 3
Fee thereon..... 5 0
Copy order for newspaper, (per folio)..... 0 6
Drawing notice to be under written, and fair copy.. 1 6
Attending printer..... 1 3
Paid insertion.....(as paid.)
Attending to pay..... 1 3
Attending for papers at various times..... 1 3
Paid for.....(as paid.)
Drawing affidavit of insertion (per folio).... 1 0

(Charge for affidavit as before, and if order is directed to be inserted in two newspapers, or to be sent by post to defendant's last known place of abode, or supposed whereabouts, charge accordingly, as per preceding scale.)

Attending bespeaking and for certificate of no answer
filed.... 2 6
Paid..... 2 6
Attending moving order pro confesso..... 5 0
Attending registrar with papers... 1 3

(Charge for order pro confesso as before.)

Defendant S. being a married woman, attending to
file affidavit of service on husband and paid.. 1 7
Attending to bespeak and for certificate of no answer
filed by her..... 2 6
Paid..... 2 6
Attending to move order that she do answer separately
and apart, fee thereon..... 5 0

Attending registrar to draw.....	1	8
Paid for order.....	(as paid.)	
Attending for, entered.....	1	8
Fee on.....	5	0
Copy for service, (<i>per folio</i>).....	0	6

(Office copy bill for her and charges for service thereof, of order, and for affidavits, &c., following similar charges, as before.)

Attending to file affidavits.....	1	8
Paid.....	(as paid.)	
Attending searching answer and paid.....	2	8
Attending bespeaking and for certificate of no answer filed.....	2	6
Paid.....	2	6
Attending moving order <i>pro confesso</i>	5	0

(Charges for order as before.)

Præcipe to set down	1	8
Paid.....	2	6
Instructions for brief	5	0
Drawing (<i>per folio</i>).....	0	6
Paid counsel fee (<i>g</i>)	50	0
Attending with and for	2	6
“ registrar with papers.....	1	8
Minutes (<i>per folio</i>) (<i>h</i>).....	1	0
Attending to settle and pass.....	5	0
“ for decree, entered.....	1	8
Paid for	(as paid.)	
Fee on.....	5	0

(If suit be for foreclosure or redemption the fees will be as follows:)

Attending to file affidavit of service and paid... ..	1	7
-------------------------------------------------------	---	---

(*g*) £2 10s. is the counsel fee usually allowed in *pro confesso* suits at the hearing.

(*h*) The minutes are usually reckoned about one-third of the length of the decree.

..... 1 3	Attending to bespeak and for certificate of no answer	
.....(as paid.)	or notice filed by defendant.....	2 6
..... 1 3	Paid for.....	2 6
..... 5 0	Drawing præcipe for decree, (<i>per folio</i>).....	1 0
..... 0 6	Fair copy, (<i>per folio</i>).....	0 6
	Attending to file.....	1 3
eof, of order,	Attending to settle and pass.....	5 0
as before.)	Paid for decree(as paid.)	
..... 1 3	Attending for entered.....	1 3
.....(as paid.)	Fee on.....	5 0
..... 2 3	Copy for master (<i>per folio</i>).....	0 6
answer	Attending to file.....	1 3
..... 2 6	Letter to registrar for further extracts	2 6
..... 2 6	Postage and on return	(as paid.)
..... 5 0	Remitted registrar and postage.....	"
	Letter to sheriff for certificate as to <i>fi. fas.</i>	2 6
	Postage and on return	(as paid.)
	Remitted sheriff and postage.....	"
..... 1 3	Attending to consider decree	5 0
..... 2 6	Preparing notice "A" (<i>per folio</i>).....	1 0
..... 5 0	The like appointment "B" (<i>where necessary</i>) (<i>per folio</i>)....	1 0
..... 0 6	Attending for warrant	1 3
..... 50 0	— copies of decree (<i>i</i>)	
..... 2 6	Attending to make office copies (<i>each</i>).....	1 3
..... 1 3	— copies of notice "A" (<i>per folio</i>)	0 6
..... 1 0	" " appointment "B" (<i>per folio</i>)	0 6
..... 5 0	" " warrant (<i>per folio</i>)	0 6
..... 1 3	" services of decree, with notice "A" endorsed (<i>each</i>).....	1 3
.. (as paid.)	" " appointment "B" (<i>each</i>)	1 3
..... 5 0	" " warrant "	1 3
	" affidavits of service, and attendances to swear	
as follows:)	(<i>each</i>)	2 0
..... 1 7	" oaths (<i>each</i>)	1 0

(i) 6d. per folio including the 1d. per folio paid to the registrar for examining and making office copies.

(Or if served by sheriff, fees as properly paid, and if sent to sheriff by post, then)

Letter to sheriff	2	6
Postage on and on return.....	(as paid.)	
Paid fees and postage remitting	“	
Drawing affidavit of plaintiff's claim (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to swear.....	1	3
Oath 1d. <i>per folio</i> and.....	1	0
Marking exhibit (<i>each</i>).....	1	0
Drawing account and fair copy.....	5	0
Bill of costs and copy.....	5	0
Attending to file papers in master's office	1	3
“ to hear and determine (<i>per hour</i>) (<i>k</i>).....	5	0
Attending on each claim (<i>k</i>).....	5	0
“ to settle report.....	5	0
“ for report.....	1	3
Paid master's fees throughout	(as paid.)	

(If the decree be for foreclosure and no claim be proved other than the plaintiffs, add)

Attending to file report and paid	1	7
“ to bespeak and for office copy.....	2	6
Office copy, (<i>per folio</i> , 6d.).....	(as paid.)	
(If a claim be proved, then subsequent costs are as follows:)		
Attending to file report and paid.....	1	7
“ to bespeak and for copy	2	6
Copy (<i>per folio</i> , 6d.).....	(as paid.)	
Drawing notice of hearing on further directions.....	3	0
Each copy and service.....	2	9
Instructions for brief thereon.....	5	0

(*k*) The master will allow the plaintiff five shillings per hour attending on the hearing and determining of his own, and all other claims, or he will allow a separate attendance of five shillings on each claim as well as his own. The plaintiff has the election in which way he will charge.

FORMS OF PROCEEDINGS.
[COSTS.—PLAINTIFF'S.—CAUSE PRO CONFESSO.]

441

ent to		Drawing same decree and report (<i>per folio</i>).....	0	6
..... 2 6		Copy notice of hearing to annex.....	1	6
... (as paid.)		Paid counsel fee (<i>l</i>)	25	0
... “		Attending with and for	2	6
..... 1 0		Attending registrar with papers.....	1	3
..... 0 6		Attending to bespeak and for minutes.....	2	6
..... 1 3		Paid for same (<i>per folio</i>).....	1	0
..... 1 0		Notice to settle, copy and service (<i>m</i>).....	3	0
..... 1 0		Extra copies and services (<i>each</i>).....	1	9
..... 5 0		Attending to settle.....	5	0
..... 5 0		Notice to pass, copy and service.....	3	0
..... 1 3		Extra copies and services (<i>each</i>).....	1	9
..... 5 0		Attending to pass.....	5	0
..... 5 0		Attending for decree entered (<i>n</i>).....	1	3
..... 5 0		Paid for.....		(as paid.)
..... 1 3		Fee on.....	5	0
... (as paid.)		Copy for master (<i>per folio</i>).....	0	6
oved		Attending to file.....	1	3
..... 1 7		Attending to consider.....	5	0
..... 2 6		Attending for warrant.....	1	3
... (as paid.)		Copy and service (<i>each</i>).....	1	9
vs :)		Drawing subsequent affidavit of claim (<i>per folio</i>).....	1	0
..... 1 7		Engrossing (<i>per folio</i>).....	0	6
..... 2 6		Attending to swear.....	1	3
... (as paid.)		Oath (<i>1d per folio, and 1s.</i>).....		
..... 3 0		Drawing subsequent account and copy.....	5	0
..... 2 9		Bill of costs and copy.....	5	0
..... 5 0		Attending to file papers.....	1	3
		Attending to hear and determine (<i>per hour</i>).....	5	0
		Attending to settle report.....	5	0
		Attending for report.....	1	3

(*l*) No more than £1 5s. is allowed on further directions in a *pro confesso* suit, except under special circumstances.

(*m*) To be served on all parties who were served with notice of hearing on further directions.

(*n*) If a sale be prayed for by defendant add: Attending to search deposit paid in, and paid, 2s. 3d.

Paid master's fees throughout.....	(as paid.)
Attending to file report and paid.....	1 7
Attending to bespeak and for copy.....	2 6
Paid for (<i>per folio 6d.</i>).....	(as paid.)

Bill of costs in suit where answer filed.

(*Costs of bill, &c., same as in previous form down to the item
"Attending to search answer and paid."*)

Having received notice of answer being filed, attending to search answer and paid (<i>n</i>).....	2 3
Demand of office copy answer, copy and service.....	2 9
Having received office copy answer, perusing same.....	5 0
Præcipe for order to produce and attending to file.....	1 3
Paid	3 0
Attending for order.....	1 3
Fee on.....	5 0
Copy and service (<i>each</i>).....	2 3
Attending to search affidavit on production filed and paid...	2 3
Notice to inspect copy and service.....	2 9
Attending to inspect papers produced (<i>per hour</i>).....	5 0

(*If bill amended, say,*)

Præcipe for order to amend and attending to file.....	1 3
Paid for order.....	(as paid.)
Attending for.....	1 3
Fee on.....	5 0
Copy and service (<i>each</i>).....	2 3
Draft amendments (<i>per folio</i>).....	1 0
Attending counsel to settle and for.....	2 6
Paid him..	10 0
Attending to amend original bill on files (<i>o</i>).....	1 3
Paid (<i>per folio, 1s.</i>).....	(as paid.)
Attending for office copy bill, to amend.....	1 3
Amending same (<i>per folio</i>).....	0 6

(*n*) This charge should not be allowed where an office copy is taken.

(*o*) If amendment exceeds two folios in length in any one place a new engrossment of the bill must be filed, for which charge as if an original bill were filed.

...(*as paid.*)
..... 1 7
..... 2 6
...(*as paid.*)

to the item
)
ng to
..... 2 3
..... 2 9
..... 5 0
..... 1 3
..... 3 0
..... 1 3
..... 5 0
..... 2 3
aid... 2 3
..... 2 9
..... 5 0

..... 1 3
...(*as paid.*)
..... 1 3
..... 5 0
..... 2 3
..... 1 0
..... 2 6
..... 10 0
..... 1 3
...(*as paid.*)
..... 1 3
..... 0 6

Attending to serve.....	1	3
(If served with order to produce, say,)		
Having been served with order to produce, draft affidavit on production and schedules (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to swear.....	1	3
Paid oath (1 <i>d.</i> <i>per folio</i> and 1 <i>s.</i>).....		
Attending to file and paid.....	1	7
Paid carriage depositing papers produced.....(<i>as paid</i>)		
Replication.....	1	0
Engrossing same.....	0	6
Attending to file.....	1	3
Paid.....	1	0
Notice of filing copy and service.....	2	9
Attending counsel with and for brief to advise on evidence (<i>p</i>). Paid him.....	2	6
Præcipe for subpoena and attending.....	25	0
Paid for subpoena.....	1	3
Copy subpoena (6 <i>d</i> <i>per folio</i>).....	5	0
Attending to serve.....	1	0
Affidavit of service and attending to swear.....	1	3
Oath.....	2	0
Paid witness.....(<i>as paid.</i>)	1	0
Instructions for brief on examination of witnesses and hear- ing.....	5	0
Drawing brief, bill, answer, and replication (<i>per folio</i>).....	0	6
Observations (<i>per folio</i>)...	1	0
Attending counsel with and for (<i>p</i>).....	2	6
Paid his fee.....		
Attending court on examination of witnesses and hearing, (where solicitor is not also counsel).....	5	0
(If judgment reserved,) attending registrar with pa- pers and exhibits.....	1	3
Drawing schedule of exhibits (<i>per folio</i>) (<i>pp</i>).....	1	0

(*p*) No attendance on counsel is allowed where he and the solicitor are the same, or partners.

n.
A new engross-
were filed.

Two copies of same, (<i>per folio</i>) (<i>pp</i>).....	0	6
Attending to hear judgment.....	5	0
Attending registrar for exhibits.....	1	3
Attending registrar to draw decree	1	3
Attending to bespeak and for numbers.	2	6
Minutes of decree (<i>per folio</i>).....	1	0
Notice of settling, copy and service.....	3	0
Every extra copy and service.....	1	9
Attending to settle.....	5	0
Notice to pass decree, copy and service.....	3	0
Every extra copy and service.....	1	9
Attending to pass decree.....	5	0
Attending for decree, entered.....	1	3
Paid.....	(as paid.)	
Fee.....	5	0

(The costs of taking the decree into the master's office, and of the proceedings therein, and of the hearing on further directions will be similar in principle to those charged on pp. 439, 440, 441, supra.)

Costs of sale by the court and conveyance thereon.

Attending moving final order of sale.....	5	0
Attending registrar to draw.....	1	3
Attending for order entered.	1	3
Paid for	(as paid.)	
Fee on.....	5	0
Copy order to keep (<i>if made</i>) (<i>per folio</i>).....	0	6
Attending to file original order (<i>or</i> decree) with master.....	1	3
“ for warrant	1	3
Copy and service (<i>each</i>).....	1	3
Drawing advertisement for sale, and copies.....	5	0
Drawing affidavit as to property (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to get same sworn.....	1	3
Paid oath	(as before.)	
Marking exhibit (<i>each</i>).....	1	0

FORMS OF PROCEEDINGS.

445

[COSTS.—PLAINTIFF'S.—SALE.]

(If affidavits prepared to apply for a reserved bidding, or as to fitness of proposed auctioneer, or more than one affidavit be necessary to verify advertisement, charge for each as above.)

Attending to file affidavits.....	1	3
Attending to settle advertisement (each hour).....	5	0
Copy advertisement for newspaper (q) (per folio).....	0	6
Attending with.....	1	3
Paid insertion..... (as paid.)		
Attending to pay..	1	3
Drawing contract of sale for purchaser to sign (per folio)....	1	0
Copy particulars, conditions and contract for printer (per folio).....	0	6
Attending him with.....	1	3
Attending examining proof.....	1	3
Paid charges for printing..... (as paid.)		
Attending to pay.....	1	3
Attending distributing posters to solicitors in cause (each)..	1	3
Paid distributing..... (as paid.)		
Attending to pay.....	1	3
Fee on conducting sale (r).....	25	0

(If auctioneer employed.)

Paid auctioneer..... (as paid.)		
Attending to pay.....	1	3
Draft affidavit of auctioneer (per folio).....	1	0
Copy (per folio).....	0	6
Attending to get sworn.....	1	3
Oath (1d. per folio and).....	1	0
Marking exhibits (each).....	1	0
Draft affidavit of publication of advertisement, and distribution of posters (per folio).....	1	0
Copy (per folio).....	0	6
Attending to get sworn.....	1	3

(q) A copy will be allowed for each newspaper in which the advertisement is directed to be inserted, and for the printing of posters.

(r) If the sale occupies more than three hours, the solicitor will in addition be allowed five shillings, for every hour beyond that time.

Oath (<i>1d. per folio and</i>).....	1	0
<i>(Where more than one affidavit necessary, charge accordingly for each affidavit.)</i>		
Attending to get deposit receipt from registrar.....	1	3
Paid him.....	1	3
Attending to pay into bank	1	3
Attending to file receipt with register and paid.....	1	7
Attending to file sale papers and affidavits with master.....	1	3
Attending to consider.....	5	0
Attending for warrant.....	1	3
Copy (<i>each</i>)	0	6
Service (<i>each</i>).....	1	3
Attending to hear and determine (<i>each hour</i>).....	5	0
Attending to settle report of sale (<i>each hour</i>).....	5	0
Attending for report.....	1	3
Paid master's fees throughout.....	<i>(as paid.)</i>	
Attending to file report and paid.....	1	7
Attending to bespeak and for office copy.....	2	6
Paid for same (<i>per folio</i>).....	0	6
Attending to search purchase money paid in and paid.....	2	3
Having received demand of abstract, drawing same (<i>per folio</i>)	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to deliver	1	3
Attending giving inspection of deeds (<i>each hour</i>).....	5	0
Having received requisitions on title, perusing same.....	5	0
Drawing replies (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to deliver.....	1	3
<i>(Charge for affidavit or other evidence supplied in verification of abstract.)</i>		
Having received conveyance, counsel fee perusing and settling same (<i>1s. per folio is usually allowed, but in discretion of master.</i>)		
Attending counsel with and for.....	2	6
Copy conveyance as settled to keep (<i>per folio</i>).....	0	6
Attending returning conveyance.....	1	3

FORMS OF PROCEEDINGS.

447

[COSTS.—PLAINTIFF'S.—PURCHASER'S.—SALE.]

Having received engrossment examining with draft (*according to length, generally for every ten folios 5s.*)

(*If conveyance settled by the master.*)

Attending warrant to settle (*each hour*)..... 5 0

Attending examining engrossment with draft (*each hour*)..... 5 0

Attending settling report on conveyance..... 5 0

(*Where conveyance is settled by the master, no counsel fee is allowed therefor as between party and party.*)

Attending execution..... 5 0

Attending to deliver and settling..... 5 0

(*If mortgage to be given by purchaser.*)

Drawing mortgage and copy (*in discretion of master*)

Attending purchaser's solicitor therewith..... 1 3

Draft mortgage having been returned approved, engrossing same.....

Memorial and affidavit of execution..... 12 6

Attending purchaser's solicitor with, for execution.. 1 3

Attending to register, and for..... 2 6

Paid 6 3

(*Add costs of subsequent account and report thereon.*)

Drawing notice of motion to pay money out of court.....

(*Charges on motion and order as before.*)

Purchaser's costs.

Attending to get deposit receipt from registrar and paid him. 2 6

Attending to pay into bank..... 1 3

Attending to file receipt with registrar and paid..... 1 7

Demand of abstract, copy and service..... 2 9

Perusing (*according to length*) 5 0

Attending examining title deeds (*per hour*)..... 1 0

Drawing requisitions (*per folio*)..... 0 6

Copy (*per folio*)..... 1 3

Attending to deliver..... 5 0

Perusing replies and evidence in support of abstract..... 5 0

Attending to search proceedings in cause (*each hour*)..... 5 0

Paid.....	(as paid.)	
Instructions for conveyance	5	0
Drawing same (<i>per folio</i>).....	1	0
Counsel fee to settle	(as supra)	
Attending with and for.....	2	6
Fair copy (<i>per folio</i>).....	0	6
Attending to deliver	1	3
Perusing same approved, and attendances thereon.....	5	0
Engrossing (<i>per folio</i>).....	0	6
Attending with draft and engrossment.....	1	3
Attending moving order to pay in purchase money.....	5	0

(Charges for order as before.)

Attending registrar for deposit receipt.....	1	3
Paid.....	1	3
Attending paying in bank.....	1	3
Attending to file receipt with registrar and paid.....	1	7
Having received draft mortgage, perusing same and settling.....	10	0
Attending returning approved.....	1	3
Examining engrossment with draft.....	5	0
Attending execution of same and memorial.....	5	0
Attending returning same and settling.....	5	0
Attending to register conveyance and for.....	2	6
Paid.....	6	3

Costs of appointment of receiver.

Copy order for receiver for master (<i>per folio</i>).....	0	6
Attending to file.....	1	3
Attending to consider.....	5	0
Attending for warrant.....	1	3
Copy warrant (<i>per folio</i>).....	0	6
Attending to serve.....	1	3
Drawing bond (or recognizance) (<i>per folio</i>).....	1	0
Engrossing same (<i>per folio</i>).....	0	6
Draft joint affidavit of justification by sureties (<i>per folio</i>)....	1	0
Copy (<i>per folio</i>).....	0	6
Attending to get sworn.....	1	3
Paid (1d. <i>per folio</i> , and two oaths 2s.).....		

FORMS OF PROCEEDINGS.

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[COSTS.—RECEIVER.]

..(as paid.)		Draft affidavit of fitness of proposed receiver (<i>per folio</i>)....	1	0
.... 5 0		Copy (<i>per folio</i>).....	0	6
.... 1 0		Attending to get sworn.....	1	3
..(as supra)		Oath (1d. <i>per folio</i> and 1s.).....		
.... 2 6		Attending execution of bond, (or on the acknowledgment		
.... 0 6		of recognizance.).....	5	0
.... 1 3		Drawing affidavit of execution of bond (<i>per folio</i>).....	1	0
.... 5 0		Copy (<i>per folio</i>).....	0	6
.... 0 6		Attending to get sworn.....	1	3
.... 1 3		Oath.....	1	0
.... 5 0		Attending to file papers in the master's office.....	1	3
		Attending to settle (<i>each hour</i>).....	5	0
.... 1 3		Attending on the appointment of receiver (<i>per hour</i>).....	5	0
.... 1 3		Attending for certificate.....	1	3
.... 1 3		Paid master's fees.....		
.... 1 7		Attending to file master's appointment of receiver and paid.	1	7
and		Copy order for receiver, and appointment for service on		
.... 10 0		him (<i>per folio</i>).....	0	6
.... 1 3		Service	1	3
.... 5 0		Attending receiver with papers and instructions to him		
.... 5 0		therewith and thereon.....	5	0
.... 5 0		<i>Plaintiff's costs on passing receiver's accounts.</i>		
.... 2 6		Attending for warrant for receiver to bring in accounts...	1	3
.... 6 3		Copy.....	0	6
		Service (<i>each</i>).....	1	3
.... 0 6		Attending searching accounts brought in.....	1	3
.... 1 3		Considering accounts (<i>each hour</i>).....	5	0
.... 5 0		Attending to bespeak and for copy (<i>if taken</i>).....	2	6
.... 1 3		Paid.....		
.... 0 6		Attending proceeding on accounts (<i>each hour</i>).....	5	0
.... 1 3		Attending to settle report (<i>each hour</i>).....	5	0
.... 1 0		Attending for report.....	1	3
.... 0 6		Paid master's fees.....		
o).... 1 0		Attending to file and paid.....	1	7
.... 0 6		Office copy.....		
.... 1 3		Attending to bespeak and for.....	2	6
....		(<i>Similar charge on each passing of accounts.</i>)		

Receiver's costs on passing his accounts.

It being necessary to sue, (or to distrain,) drawing affidavit in support of application for order (*usual charges for affidavits, attending to file, &c.*).....

Notice of motion for leave (*usual charges for notice of motion and services.*).....

Attending chambers, order granted..... 5 0

Attending registrar to draw..... 1 3

*(Usual charges for order.)**(Any further similar applications, the like charges.)*

Having been served with warrant to bring in, drawing account (*per folio*)..... 1 0

Engrossing (*per folio*)..... 0 6

Drawing affidavit of verification (*per folio*)..... 1 0

Engrossing (*per folio*)..... 0 6

Attending to swear..... 1 3

Oath (*1d. per folio 1s.*).....

Marking exhibits (*each*)..... 1 0

Attending to file account, affidavit and vouchers, &c..... 1 3

Paid.....(*as paid.*)

Attending proceeding on accounts (*each hour*)..... 5 0

(If further affidavits or other evidence required to verify the account, charge for accordingly.)

Bill of costs..... 5 0

Attending to settle report (*each hour*)..... 5 0

Attending for report 1 3

Attending to file and paid..... 1 7

Attending to bespeak and for office copy..... 2 6

Paid (*per folio 6d.*)..... (*as paid.*)

(Add receiver's charges for travelling expenses necessarily incurred in collecting debts or otherwise administering the estate, including payments made by him for advice and assistance, and such other charges properly incurred and actually paid by him.)

Add receiver's per centage.....

Paid postages..... (as paid.)
Paid master's fees (other than above)..... (as paid.)
(Similar charges on each passing of accounts.)

Drawing notice of motion to discharge receiver and vacate his
recognizance (if direction not given by decree or order on
further directions, usual charge for notice of motion.)

Drawing affidavit of payment of balances (usual charges for
affidavits.).....

Attending chambers, &c., (usual charges for orders)

Defendant's costs of suit.

Instructions for answer.....	10	0
Drawing same (<i>per folio</i>).....	1	0
Paid counsel to settle.....	10	0
Attending him with and for.....	2	6
Engrossing answer (<i>per folio</i>).....	0	6
Attending to swear.....	1	3
Attending to read over.....	5	0
Paid commissioner, oath, and folding.....	2	3
Attending to file.....	1	3
Paid filing.....	3	0
Notice of filing copy and service.....	2	9
Office copy having been demanded, making same and paid (<i>per folio</i>).....	0	6
Attending to examine.....	1	3
Attending to serve.....	1	3
Præcipe for order to produce.....	1	3
Attending registrar for order.....	1	3
Paid for order.....	3	0
Fee on.....	5	0
Copy and service.....	2	3
Attending searching affidavit filed.....	1	3
Paid.....	1	0
Attending to bespeak and for office copy.....	2	6
Paid..... (as paid.)		
Notice to inspect copy and service.....	2	9
Attending inspection (<i>each hour</i>).....	5	0

FORMS OF PROCEEDINGS.

[COSTS.—DEFENDANT'S.—SUIT.]

(If no affidavit filed costs of contempt are as follows.)

Attending bespeaking certificate.....	1	3
Paid registrar for.....	2	6
Attending for.....	1	3
Attending moving order nisi.....	5	0
Attending registrar to draw	1	3
Paid for order.	<i>(as paid.)</i>	
Attending for entered.....	1	3
Fee on.....	5	0
Copy (<i>per folio</i>).....	0	6
Drawing endorsement and copy.....	1	6
Attending sheriff with and for.....	2	6
Paid his fees for service.....	<i>(as paid.)</i>	
Affidavit of service.....	2	0
Attending to search affidavit filed....	1	3
Paid.....	1	0
Attending to bespeak certificate.....	1	3
Paid.....	2	6
Attending for.....	1	3
Attending moving order absolute.....	5	0
Attending registrar to draw.....	1	3
Paid for.....	<i>(as paid.)</i>	
Attending for entered.....	1	3
Fee on.....	5	0
Præcipe for attachment.....	1	3
Paid for.....	7	6
Attending for.....	1	3
Fee on.....	5	0
Endorsement... ..	2	6
Attending sheriff with and for.....	2	6
Paid sheriff's fees.....	<i>(as paid.)</i>	
Having received notice of motion to vacate attachment, attending searching affidavits filed.....	1	3
Paid	1	0
Demand of office copy, copy and service.....	2	9
Attending motion affidavits insufficient, and further affidavits to be filed, motion stands.....	5	0

llows.)

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..... 2 6
..... 1 3
..... 5 0
..... 1 3
..(as paid.)
..... 1 3
..... 5 0
..... 0 6
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..(as paid.)
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Having received notice of further affidavits filed, attending searching.....	1 3
Paid.....	1 0
Attending motion, attachment discharged on pay- ment of costs.....	5 0
Attending to settle and pass order.....	5 0
Bill of costs.....	5 0
Attending to file.....	1 3
Attending for certificate.....	1 3
Paid master's fees.....(as paid.)	1 3
Attending receiving costs, and giving receipt to sheriff.	1 3
Plaintiff having served order to produce, drawing affidavit (per folio).....	1 0
Engrossing (per folio).....	0 6
Attending to get sworn.....	1 3
Oath.....(as before.)	1 3
Attending to file.....	1 3
Paid.....	0 4
Attending giving inspection (each hour).....	5 0
Attending searching replication	1 3
Paid.....	1 0
(If not filed costs of motion to dismiss as follows.)	
Drawing notice of motion to dismiss (per folio).....	1 0
Copy (per folio).....	0 6
Service.....	1 3
Attending bespeaking and for certificate.....	2 6
Paid.....	2 6
Drawing affidavit in support, (per folio,) (if necessary)	1 0
Engrossing (per folio).....	0 6
Attending to swear.....	1 3
Paid oath.....(as before.)	1 7
Attending to file and paid.....	1 0
Marking exhibits (each).	5 0
Attending on motion, plaintiff undertook to speed....	1 3
Attending registrar to draw order.....	3 0
Notice to settle and pass.....	

FORMS OF PROCEEDINGS.

[COSTS.—DEFENDANT'S.—SUIT.]

Attending thereon.....	5	0
Paid for order.....	(as paid.)	
Attending for entered	1	3
Fee on	5	0
Copy (<i>per folio</i>)	0	6
Service	1	3
Copy for master (<i>per folio</i>).....	0	6
Attending to file.....	1	3
Warrant, copy, and service	3	0
Bill of costs	5	0
Attending for certificate	1	3
Paid master's fees.....	(as paid.)	
Attending searching replication, same filed.....	1	3
Paid	1	0

(If plaintiff served order to amend.)

Attending on office copy being amended.....	1	3
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(If on motion.)

Attending thereon.....	5	0
Drawing answer to amendments (<i>per folio</i>).....	1	0
Paid counsel to settle.....	10	0

(And other charges as for answer to original bill.)

Counsel fee to advise on evidence.....	25	0
Attending with and for.....	2	6
Instructions for brief	5	0
Drawing same, of pleadings (<i>per folio</i>).....	0	6
Præcipe for subpoena.....	1	3
Paid for.....	5	0
Copy (<i>each</i>).....	0	6
Service (<i>each</i>).....	1	3
Paid witnesses.....	(as paid.)	
Affidavit of service and payment (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to swear.....	1	3
Oath.....	0	0

(If served by sheriff.)

Attending with and on return.....	2	6
Paid sheriff.....	(as paid.)	

(Affidavit and copy as before.)

A witness residing in Lower Canada drawing affidavit to support application for order for subpoena (<i>per folio</i>)	1	0
Copy (<i>per folio</i>).....	0	6
Attending to swear.....	1	3
Oath.....	(as before.)	
Attending to move order.....	5	0
Attending registrar to draw.....	1	3
Paid for order.....	(as paid.)	
Attending for entered.....	1	3
Fee on.....	5	0
Copy (<i>per folio</i>).....	0	6
Præcipe for subpoena.....	1	3
Paid for.....	5	0
Letter to agents with order and subpoena.....	2	6
Copy subpoena to enclose.....	0	6
Affidavit.....	(as before.)	
Paid agent's charges.....	0	0
Letter with.....	2	6
Præcipe for order to read proceedings in another cause....	1	3
Paid for order.....	(as paid.)	
Attending for entered.....	1	3
Fee on.....	5	0
Copy (<i>per folio</i>).....	0	6
Service.....	1	3
Observations, or other original matter on brief (<i>per folio</i>)...	1	0
Copy notices to annex (<i>per folio</i>).....	0	6
Paid counsel fee on examination of witnesses and hearing...		
Attending him with and for.....	2	6
Præcipe for order to prove exhibits by affidavit.....	1	3
Attending for, entered.....	1	3
Paid for.....	(as paid.)	

Fee on.....	5	0
Copy (<i>per folio</i>).....	0	6
Service	1	3
Drawing affidavit (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to get sworn.....	1	3

(*And like charges as for affidavit, supra.*)

(*If cause not set down by plaintiff.*)

Attending to search cause set down and paid.....	2	3
Præcipe to set down for examination of witnesses and hearing.....	1	3
Paid.....	(as paid.)	
Drawing notice thereof (<i>per folio</i>).....	1	0
Copy (<i>per folio</i>).....	0	6
Service (<i>each</i>).....	1	3

(*If two counsel fees and briefs allowed by order of judge, the fees therefor will be as at page 433, supra.*)

Attending court on examination of witnesses and hearing, (<i>if solicitor not counsel,</i>) judgment reserved.....	5	0
Attending registrar with papers and exhibits.....	1	3
Drawing schedule thereof (<i>per folio</i>).....	1	0
Two copies (<i>per folio</i>).....	0	6
Attending to hear judgment, bill dismissed with costs.....	5	0
Attending registrar for exhibits.....	1	3
Attending registrar to draw decree.....	1	3

(*Same charges as at page 441, supra.*)

Copy decree for master (<i>per folio</i>).....	0	6
Attending to file.....	1	3
Attending for warrant to tax.....	1	3
Copy (<i>each</i>).....	0	6
Service (<i>each</i>).....	1	3
Bill of costs.....	5	0
Attending to file.....	1	3
Attending for certificate.....	1	3

FORMS OF PROCEEDINGS.
[COSTS.—RE-HEARING.]

457

Paid master.....	(as paid.)
Paid postages.....	(as paid.)

(Conditional costs.)

Attending to file certificate.....	1 3
Præcipe for <i>fi. fa.</i> and bespeaking.....	1 3
Paid for.....	(as paid.)
Fee on.....	5 0
Attending for.....	1 3
Endorsing and copy.....	1 6
Attending sheriff with.....	1 3
Attending return.....	1 3

(If decree for plaintiff.)

Attending to settle minutes.....	5 0
Attending to bespeak and for copy as settled.....	2 6
Paid for.....	(as paid.)
Drawing notice of motion to vary (<i>per folio</i>).....	1 0
Copy (<i>per folio</i>).....	0 6
Service (<i>each</i>).....	1 3
Paid counsel.....	
Attending him with and for.....	2 6
Hand brief for him (<i>s</i>).....	
Attending court minutes varied and settled.....	5 0
Attending to pass decree.....	5 0

(It being determined to re-hear the cause at the instance of defendant.)

Costs of re-hearing.

Attending to bespeak and for office copy decree....	2 6
Paid.....	(as paid.)
Drawing petition (<i>per folio</i>).....	1 0
Paid counsel to settle.....	10 0
Attending with and for.....	2 6

(s) Not allowed on strict taxation.

Engrossing (<i>per folio</i>)	0 6
Drawing fiat	1 0
• Engrossing	0 6
Attending chambers to present petition and for fiat.	5 0
Attending for deposit receipt.....	1 3
Attending to pay deposit into bank.....	1 3
Paid registrar.....	1 3
Attending to file receipt and paid.....	1 7
Drawing undertaking.....	1 0
Endorsing on petition.....	0 6
Attending second counsel with papers and for....	2 6
Paid him fee for certificate.....	
Attending for certificate by other counsel.....	1 3
Attending signing undertaking by solicitor, and wit- nessing	1 3
Attending registrar to draw order.....	1 3
Paid for.....(<i>as paid</i> .)	
Attending for, entered.....	1 3
Fee on.....	5 0
Copy order, petition, undertaking and certificate for service (<i>per folio</i>).....	0 6
Service	1 3
Attending to file petition and paid.....	1 7
Præcipe to set down.....	1 3
Paid.....	10 0
Drawing notice (<i>per folio</i>).....	1 0
Copy (<i>per folio</i>).....	0 6
Service (<i>each</i>)	1 3
Instructions for brief....	5 0
Drawing same decree and petition (<i>per folio</i>).....	0 6
<i>(Copy notice to annex, and paid counsel and other fees on re-hearing as before charged on hearing.)</i>	
Attending court, cause re-heard, judgment reserved.	5 0
Attending to hear judgment.....	5 0
<i>(If decree reversed or varied, charges for drawing</i>	

FORMS OF PROCEEDINGS.

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[COSTS.—MASTER'S OFFICE—APPEAL FROM REPORT.]

*up order same as for drawing up decree supra, if
decree stands, plaintiff to draw up order and tax
his costs according to the practice.)*

Having received warrant to consider decree attending mas-
ter on return thereof (*each hour*)..... 5 0
Drawing accounts according to direction of master (*per folio*) 1 0
Fair copy (*per folio*)..... 0 6

(*Charge for each account and for each affidavit of verification as
before charged.*)

Attending to file..... 1 3
Attending proceeding thereon (*each hour*)..... 5 0

*The proceedings in the master's office should be charged for
as performed; they consist for the most part of at-
tendances, for which for each hour allowed by master,
charge*..... 5 0

Of affidavits, as before charged therefor.....
Of surcharges, drawing and copy, as before.....
Of attendances to file, or for warrant, or otherwise than a
special attendance..... 1 3

Of witnesses and for office copy depositions, the same as be-
fore the court, or a special examiner, see supra 443, 434.

Attending to settle report (*each hour*)..... 5 0

Attending to bespeak and for duplicate..... 2 6

Paid for..... (*as paid.*)

Paid postages..... (*as paid.*)

Paid master..... (*as paid.*)

(*It being necessary to appeal against report.*)

Costs on appeal therefrom.

Attending to file duplicate and paid..... 1 7

Drawing notice of appeal (*per folio*)..... 1 0

Copy (*per folio*)..... 0 6

Service (*each*)..... 1 3

Præcipe to set down..... 1 3

Instructions for brief on appeal..... 5 0

FORMS OF PROCEEDINGS.

[COSTS.—MASTER'S OFFICE.]

Drawing same, decree and report (<i>per folio</i>).....	0	6
Copy notice to annex (<i>per folio</i>).....	0	6
Paid counsel.....		
Attending with and for.....	2	6

(*And other charges attending court, drawing order, &c., as before charged for similar services.*)

Report having been referred back, copy order for master (<i>per folio</i>).....	0	6
Attending to file.....	1	3
Attending for warrant.....	1	3
Copy (<i>each</i>).....	0	6
Services (<i>each</i>).....	1	3
Attending to hear and determine (<i>each hour</i>).....	5	0
Attending to settle report (<i>each hour</i>).....	5	0
Attending for report signed.....	1	3
Attending to file and paid.....	1	7
Attending to bespeak and for copy.....	2	6
Paid.....(<i>as paid.</i>)		
Plaintiff having served notice of hearing on further directions, Instructions for brief thereon.....	5	0
Drawing same (<i>per folio</i>).....	0	6
Copy notice to annex (<i>per folio</i>).....	0	6
Observations (<i>if any</i>) (<i>per folio</i>).....	1	0
Paid counsel fee.....		
Attending with and for	2	6

(*And other the like charges as after the hearing and for proceedings in the master's office, for which see supra.*)

Defendant's costs on resisting motion for injunction considered as an interlocutory application.

Having received notice of motion for injunction attending searching affidavits.....	1	3
Paid.....	1	0
Demand of office copies, copy and service.....	2	9

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FORMS OF PROCEEDINGS.
[COSTS.—DEFENDANT'S.—INJUNCTION.]

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Attending special examiner for appointment to cross-examine deponents to plaintiff's affidavits.....	1	3
Paid special examiner.....	1	3
Copy and service on plaintiff's solicitor	1	9
Præcipe for subpœna.....	1	3
Paid for... ..	5	0
Copy subpœna and appointment (<i>each</i>).....	1	0
Service on each deponent.....(<i>as before.</i>)	5	0
Attending special examiner (<i>each hour</i>).....	2	6
Attending bespeaking and for office copy depositions.....	(<i>as paid.</i>)	
Paid fees to special examiner.....	1	0
Drawing affidavit of A. B. in answer (<i>per folio</i>).....	(<i>Charge for each affidavit as before.</i>)	
Attending to file	1	3
Paid filings (<i>each</i>).....	0	4
Instructions for brief.....	5	0
Drawing same, pleadings (<i>per folio</i>) (<i>t</i>).....	0	6
Copy notice of motion to annex (<i>per folio</i>).....	0	6
Paid counsel fee (<i>t</i>).....	2	6
Attending him with and for	5	0
Attending court (<i>if solicitor not also counsel</i>) motion to stand for a week at plaintiff's request, defendant undertaking.....	0	6
Demand having been served for office copy affidavits filed by defendant, making same (<i>per folio</i>).....	1	3
Attending to examine (<i>each</i>).....	1	3
Attending to deliver	5	0
Having received notice of cross-examination of deponents to affidavits filed by defendant, attending special examiner (<i>each hour</i>).....	2	6
Attending to bespeak and for office copy depositions.....		

(*t*) If two counsel fees and brief pleadings affidavits and exhibits allowed by order of judge, (*but not otherwise,*) charge for these. The first counsel is presumed to use the drafts and office copies of the affidavits, and therefore a brief of the pleadings only is taxable for him. See *supra*, p. 433.

Paid for	(as paid.)
Attending court on motion, injunction refused, counsel fee thereon.....	(as paid.)
Attending with and for.....	2 6
Attending registrar to draw order.....	1 3
Notice to settle and pass.....	3 0
Attending thereon	5 0
Paid for order.....	(as paid.)
Attending for entered.....	1 3
Fee on	5 0
Copy (<i>per folio</i>).....	0 6
Service	1 3
Copy for master (<i>per folio</i>).....	0 6
Attending to file.....	1 3
Attending for warrant.....	1 3
Copy and service.....	1 9
Bill of costs.....	5 0
Attending to file.....	1 3
Attending for certificate.....	1 3
Paid master's fees.....	(as paid.)

Defendant's costs on motion to dissolve injunction, obtained by plaintiff.

Having received copy injunction served on defendant attending searching affidavits and proceedings, and paid... 2 3

(Proceed as in preceding form to the charge for

Drawing affidavit of A. B. in support of motion (*per folio*) 0

(Charge for each affidavit as before.)

Attending to file

Paid..... (as paid.)

Drawing notice of motion to dissolve injunction (*per folio*)... 1 0

Copy (*per folio*)

Service

Affidavit and attending to swear and oath..... 3 0

(The remaining charges, according to the circumstances, can be obtained from the preceding form.)

Appellant's costs of appeal on appeal from Chancery.

Instructions for petition of appeal.....	10	0
Præcipe to enrol decree.....	1	3
Paid enrolment.....	(as paid.)	
Attending thereon.....	1	3
Drawing petition, 3 fo.....	3	0
Paid counsel to settle.....	10	0
Attending him with and for.....	2	6
Engrossing petition.....	1	6
Attending counsel with and for certificate.....	2	6
Paid him fee for certificate.....		
Attending second counsel with papers and for certificate....	2	6
Paid him.....		
Drawing bond, 6 fo.....	6	0
Engrossing.....	3	0
Attending execution.....	5	0
Drawing affidavit of execution (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Attending to swear.....	1	3
Oath.....	1	0
Drawing affidavit of justification (<i>similar charges as for affidavit of execution.</i>)		
Attending to file bond and papers.....	1	3
Paid.....	(as paid.)	
Notice of filing, copy and service.....	2	9
Drawing notice of names, descriptions and additions of sureties (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Service (<i>each</i>).....	1	3
Bond being sufficient, præcipe to set down appeal for argument.....	1	3
Paid.....	(as paid.)	
Drawing notice of setting down (<i>per folio</i>).....	1	0
Engrossing (<i>per folio</i>).....	0	6
Service (<i>each</i>).....	1	3
Drawing reasons of appeal (<i>per folio</i>).....	1	0

Paid counsel to settle.....	
Attending with and for.....	2 6
Engrossing reasons (<i>per folio</i>).....	0 6
Attending to deliver.....	1 3
Notice to respondents to serve reasons against appeal, copy and service.....	2 9
Drawing appeal book (<i>per folio</i>)	1 0
Fair copy (<i>per folio</i>)	0 6
Attending printer.....	1 3
Fee on examining proof, correcting, revising, and making up appeal book (<i>depends on length of book.</i>)	
Paid printer	(as paid.)
Attending to pay.....	1 3
Attending delivering to other side (<i>each</i>).....	1 3
Attending delivering to judges (<i>each</i>)	1 3
Attending delivering to registrar	1 3
Instructions for brief.....	5 0
Drawing same.....	
Observations (<i>per folio</i>).....	1 0
Attending (<i>each</i>) counsel with and for.....	2 6
Paid (<i>as per fiat</i>).....	
Attending court, appeal argued judgment reserved (<i>if solicitor not also counsel</i>).....	5 0
Attending court to hear judgment.....	5 0
<i>(Costs of drawing up order same as drawing up decree. See supra.)</i>	
Bill of costs.....	5 0
Postages	(as paid.)

Respondent's costs on appeal.

Having been served with petition in appeal.....	
Instructions on appeal.....	10 0
Attending searching appeal bond and affidavits, and perus- ing and considering same and paid.....	2 3
Attending receiving appellant's reasons of appeal, perusing and considering same.....	1 3

FORMS OF PROCEEDINGS.
[COSTS.—COURT OF APPEAL.]

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Drawing respondents reasons against appeal (<i>per folio</i>)....	1	0
Attending counsel with and for to settle and sign	2	6
Paid him	10	0
Engrossing reasons against appeal (<i>per folio</i>)	0	6
Attending to deliver to appellant	1	3
Instructions for brief on appeal	5	0
Drawing same (<i>per folio</i>)	0	6
Observations	5	0
Attending counsel with and for to argue on appeal	2	6
Paid his fee		
Attending searching if appeal set down	1	3
Paid		
Attending court, appeal argued, judgment reserved	5	0
Attending court to hear judgment	5	0
Attending registrar with papers	1	3

(Costs drawing up order, &c., as before.)

PART THE THIRD.

STATUTES

RELATING TO

THE PRACTICE AND JURISDICTION

OF THE

COURT OF CHANCERY.

AN ACT RESPECTING THE COURT OF CHANCERY.

[CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAPTER XII.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

Court of Chancery continued.

1. The Court of Chancery now existing in Upper Canada is hereby continued, and shall continue to be called the Court of Chancery for Upper Canada. 7 Wm. IV., ch. 2, sec. 1. (*u*)

(*u*) The Court of Chancery for Upper Canada, as at present constituted, owes its existence to an act of the parliament of Upper Canada, 7 Will. IV., ch. II., dated the 4th March, 1837.

The constitution of the court was materially altered by the act 12 Vic., ch. LXIV.; under this act the number of judges was increased to three; and the offices of registrar and master were separated. They had formerly been filled by one person.

The act 13 and 14 Vic., ch. L. empowered the judges of the court to appoint masters and deputy-registrars, "in such localities as the said judges may consider necessary and expedient for the purpose of promoting as far as possible the local administration of justice," and the acts 16 Vic., ch. CLIX., and 20 Vic., ch. LVI., otherwise rendered the same more effectual.

These acts are now consolidated as ch. XII. of the Consolidated Statutes of Upper Canada.

SEAL.

2. The Governor in council may, from time to time, determine and declare the seal to be used in the court, and by which its judgments and proceedings shall be certified and authenticated. 7 Wm. IV., ch. 2, sec. 18.

The Governor to determine the seal to be used by the court.

THE JUDGES.

3. The court shall be presided over by a chief judge, to be called the Chancellor of Upper Canada, and two additional judges, to be called Vice-Chancellors. 12 Vic., ch. 64, sec. 1.

A Chancellor and two Vice-Chancellors to preside over the court.

4. Her Majesty may from time to time, as vacancies occur, appoint, by letters patent under the great seal of this province, one person, being a barrister-at-law of not less than ten years' standing at the bar of Upper Canada, to be Chancellor, and two persons, being barristers of not less than ten years' standing at the said bar, to be Vice-Chancellors; and the Chancellor of Upper Canada shall have rank and precedence next after the Chief Justice of Upper Canada; and the Vice-Chancellors and the Puisne Judges of the Superior Courts of Common Law shall have rank and precedence as between themselves according to seniority of appointment to their respective offices. 12 Vic., ch. 64, sec. 2.

Her Majesty may appoint the Chancellor and Vice-Chancellors.

5. The judges shall hold their offices during good behaviour; but the Governor in council may remove any of them upon the address of the two houses of the parliament of the province; and in case a judge so removed thinks himself aggrieved thereby, he may within six months appeal to her Majesty in her Privy Council, and in that case such a motion shall not be final until the appeal has been determined by her Majesty in her Privy Council. 12 Vic., ch. 64, sec. 3.

To hold office during good behaviour.

SALARIES.

6. In respect to the salaries of the judges, there shall,

Salaries provided
for.

out of the consolidated revenue fund of the province, (after paying or reserving sufficient to pay all such sums as were before the thirtieth of May, one thousand eight hundred and forty-nine, directed by any act of the parliament of this province, to be paid out of the same, but with preference to all other payments thereafter charged upon the same) be paid to the Chancellor, five thousand dollars per annum; and to each of the other judges, four thousand dollars per annum; and these sums shall be paid quarterly, free from all taxes and deductions, on the first day of January, the first day of April, the first day of July, and the first day of October, by equal portions, the first payment to be made on the first of those days which occurs after the appointment of the judge entitled to receive the same; and in case any of the judges be removed from office or die or resign office, such judge or his executor or administrator shall be entitled to receive such proportionable part of the salary as accrued during the time that he executed the office subsequent to the last payment, and the successor to the office vacated by such judge shall receive such portion of the salary as accrues from the day of his appointment. 12 Vic., ch. 64, sec. 4.

RETIRING ANNUITIES.

Retiring annuities provided for.

7. In case any judge of the said Court of Chancery has continued in the office of a judge of one or more of the superior courts of law or equity in Upper Canada, for fifteen years, or becomes afflicted with some permanent infirmity disabling him from the due execution of his office, and in case such judge resigns his said office of judge, her Majesty may, by letters patent under the great seal of this province, reciting such period of service or permanent infirmity, grant unto such judge an annuity equal to two thirds of the salary annexed to the office of such judge, to commence immediately after the period of

his resignation and to continue thenceforth during his natural life; and such annuity shall be charged upon and be paid out of the consolidated revenue fund of this province, after paying or reserving sufficient to pay all such sums of money as by any acts of the parliament of this province in force on the thirtieth day of May, one thousand eight hundred and forty-nine, have been directed to be paid thereout, but with preference to all other payments thereafter charged upon the same fund; and such annuity shall be paid quarterly, by equal portions on the first days of January, April, July and October, in each year, free from all taxes and deductions whatsoever; and the first quarterly payment, or a proportionate part thereof to be computed from the time of his resignation, shall be made on such of the said days as next happens after the resignation; and the executors or administrators of the person to whom the annuity has been granted shall be paid such proportionate part of the same as accrued from the commencement, or the last quarterly payment thereof, as the case may be, to the day of his death.

12 Vic., ch. 64, sec. 5.

8. Every judge shall, previous to executing the duties of his office, take the following oath, which oath shall be administered to the Chancellor before the Governor in council, and to the Vice-Chancellors in open court in presence of the Chancellor. 12 Vic., ch. 64, sec. 6.

"I, ———, do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me, as Chancellor (or Vice-Chancellor). So help me God."

OFFICERS.

9. The Governor in council may, from time to time, under the great seal of the province, appoint during pleasure, one registrar, one master in ordinary, one

Officers, registrar,
master, account-

ant, sergeant-at-arms.

accountant, and a sergeant-at-arms, to the court; and these officers shall, in addition to the duties usually performed by the like officers in England, be liable to perform any other duties assigned to them by the court. 7 Wm. IV., ch. 2, sec. 9; 12 Vic., ch. 64, sec. 12.

Registrar and master may appoint clerks.

10. The registrar and master in ordinary may each appoint one clerk, subject to the approval of the judges, and may with the like approval remove such clerk at pleasure. 13 & 14 Vic., ch. 50, sec. 3; 12 Vic., ch. 64, sec. 12.

Not allowed fees.

11. The master in ordinary, registrar, or clerk so appointed, shall not take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled by law; but the like sums and fees heretofore payable and receivable in the court shall continue to be payable and receivable by the like persons; and all the fees received by or on account of the master and registrar, shall form part of the consolidated revenue fund of the province. 12 Vic., ch. 64, sec. 13.

How fees to be disposed of.

To make quarterly returns of fees received;

12. The master in ordinary and registrar respectively shall, on the four quarterly days hereinbefore mentioned, render to the Minister of Finance a true account in writing of all the fees received by or on account of his office, in such form and with such particulars as the Minister of Finance from time to time requires; and shall sign the account, and declare the truth thereof before one of the judges of the court; and shall, within ten days after rendering the account, pay over the amount of the fees to the Receiver-General; and if default be made in such payment, the amount shall be deemed a specialty debt to her Majesty. 12 Vic., ch. 64, sec. 14.

And pay the same to the Receiver-General.

The court may appoint and re-

13. The judges may, from time to time, under the seal of the court, appoint, and at their discretion remove, local masters and deputy-registrars (both of which offices may be held by one person) in such places respectively out of Toronto as the judges may think expedient for

the purpose of promoting as far as practicable the local administration of justice; and the judges may likewise in manner aforesaid, appoint and remove commissioners for administering oaths and taking affidavits and depositions in the said court with the powers formerly possessed by masters extraordinary and examiners; and also an usher to attend on the court, and the respective judges thereof, during the sittings of the court and judges respectively for the transaction of business, and to execute such process of the court as may be directed to him. 13 & 14 Vic., ch. 50, sec. 1 : 20 Vic., ch. 56, secs. 17, 19; 7 Wm. IV., ch. 2, sec. 10.

more local masters and deputy registrars.

Also commissioners for taking affidavits.

And an usher.

14. There shall be paid out of the consolidated revenue fund of the province, (after paying or reserving sufficient to pay all such sums as were directed by any act of the parliament of this province before the thirtieth day of May, one thousand eight hundred and forty-nine, to be paid thereout, but with preference to all payments thereafter charged upon the same) the yearly sums following as and for the salaries of the master in ordinary, the registrar and the clerk of the registrar, that is to say: to the master, two thousand dollars; to the registrar, one thousand six hundred dollars; and to the clerk, five hundred dollars; which sums shall be paid quarterly, free from all taxes and deductions, on the first quarterly days hereinbefore mentioned; but the payment to be made in each case on the first of the quarterly days which happens after the right thereto accrues, shall be a rateable proportion of a quarter's salary, according to the time then elapsed since the accrual of the right; and in case of a vacancy in the office of such master, registrar or clerk, the person making the vacancy, his executors or administrators, shall be entitled to a proportional part of his salary according to the time elapsed between the vacancy and the last quarterly payment; and there shall also be paid out of the consolidated revenue fund

Salaries of officers provided for.

of the province (after paying or reserving sufficient to pay all such sums as have been directed by any act of the parliament of this province before the tenth day of August, one thousand eight hundred and fifty, to be paid out of the same, but with preference to all payments thereafter charged upon the same) the yearly sum of five hundred dollars, for the salary of the clerk in the master's office. 12 Vic., ch. 64, sec. 12; 13 & 14 Vic., ch. 50, sec. 3.

Local officers may take fees.

15. The local masters, the deputy-registrars and the commissioners may retain to their own use all the fees of office which they respectively receive not belonging to any fee fund, and need not account to the Crown for any portion of such fees. 20 Vic., ch. 56, sec. 16.

The governor may appoint additional clerks.

16. The Governor in council may, from time to time, appoint an additional clerk or additional clerks in the court, when the business of the court requires the same and the judges of the court apply for such appointment, and the clerk or clerks shall perform such duties as the court may, from time to time, by general orders or otherwise, direct. 20 Vic., ch. 56, sec. 18.

Oath of office of officers.

17. Every officer of the court before he enters upon his duties, shall take and subscribe the following oath, which oath shall be administered by the judges, or one or more of them in open court.

"I, A. B., of —, do hereby solemnly swear, that
"I will, according to the best of my skill, learning,
"ability and judgment, well and faithfully execute and
"fulfil the duties of the office of master, &c., (*as the case may be,*) without favour or affection, prejudice or partiality, to any person or persons, whomsoever. So
"help me God." 7 Wm. IV., ch. 2, sec. 20.

Who to administer.

18. When not convenient to a person appointed to any office to attend at Toronto, to take the oath of office, the court may direct the oath to be taken before the judge of the county court of the county in which

such officer resides, and the oath shall be certified by such judge and filed in the office of the registrar. 1 Vic., ch. 14, sec. 3.

19. Sheriffs, deputy-sheriffs, gaolers, constables and other peace officers, shall aid, assist and obey the court and the judges thereof respectively in the exercise of the jurisdiction conferred by this act, and otherwise, whenever by any general or other order of the court or of a judge thereof required so to do. 20 Vic., ch. 56, sec. 6; 7 W. 4, c. 2, s. 14.

THE CONDUCT OF BUSINESS.

20. The court shall be holden at the city of Toronto, or in any other place from time to time appointed by proclamation of the Governor. 7 Wm. IV., ch. 2, sec. 1.

21. The judges shall sit together for all business not directed by general or other orders to be transacted before a single judge, and in such case the Chancellor or, if he be absent, the senior Vice-Chancellor shall preside. 12 Vic., ch. 64, sec. 7.

22. The judges may sit separately, either at the same time or at different times, for the hearing and disposing of such matters and the transaction of such business as may from time to time in that behalf be directed by general or other orders of the court; and the decrees and orders made by a single judge in such cases shall have the force and effect of, and be deemed for all purposes to be, decrees and orders of the court, but shall be subject to re-hearing before the full court, or otherwise, in such cases as the court, by general orders or otherwise, from time to time directs or appoints; and every judge so sitting separately, whether at Toronto or elsewhere, shall have all the powers of the full court, subject to any general orders in that behalf. 20 Vic., ch. 56, sec. 7.

23. The judges, or one or more of them, shall also

The judges to
make circuits for
taking evidences
and other pur-
poses.

take circuits for the transaction of such business of the court as it may be practicable and conducive to the interests of suitors and the convenient administration of justice to dispose of on such circuits; and for that purpose the court, or one or more of the judges thereof, may hold sittings for the purposes of taking such evidence and hearing such causes and other matters, and transacting such other business, and at such periods and at such county towns as the court from time to time sees fit to direct and appoint; and such sittings may, at the discretion of the court or of the judge who is to hold the same, be held in the court-house of the county town in which the same are appointed to be held, or in such other place in the county town as the judge selects; and the judge shall in all respects have the same authority as a judge at *nisi prius* in regard to the use of the court-house, gaol and other buildings or apartments set apart in the county for the administration of justice. 20 Vic., ch. 56, sec. 6.

Witness to be
examined *viva*
voce.

24. All witnesses in any matter pending before the court, or before any of the masters thereof, shall give their testimony *viva voce*, and be subject to examination by counsel, in the presence of one or more of the judges, or of the masters, unless it be otherwise ordered by the court, on special grounds, or with the consent of the parties in the suit or controversy to which the testimony relates. 7 Wm. IV., ch. 2, sec. 6.

RULES OF DECISION.

Rules of decision. 25. The rules of decision in the court shall, except when otherwise provided, be the same as governed the Court of Chancery in England in like cases on the fourth day of March, one thousand eight hundred and thirty-seven, and the court shall possess power to enforce obedience to its orders, judgments and decrees, to the same extent as was then possessed by the Court of

Chancery in England. 7 Wm. IV., ch. 2, sec. 6; 12 V., ch. 64, sec. 9.

GENERAL JURISDICTION.

26. The court shall have the like jurisdiction and power as by the laws of England were at the said date possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say:—

Jurisdiction.

1. In all cases of fraud (*b*) and accident; (*c*)
2. And in all matters relating to trusts, (*d*) executors and administrators, (*e*) co-partnership and account, (*f*) mortgages, (*g*) awards, (*h*) dower, (*i*) infants, (*k*) idiots, lunatics and their estates; (*l*)
3. And also to stay waste; (*m*)
4. To compel the specific performance of agreements; (*n*)
5. To compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same; (*o*)
6. To prevent multiplicity of suits; (*p*)
7. To stay proceedings in a court of law prosecuted against equity and good conscience; (*q*)
8. To decree the issue of letters patent from the Crown to rightful claimants; (*r*)
9. To repeal and avoid letters patent issued erroneously or by mistake or improvidently or through fraud; (*s*)
10. And generally, the like jurisdiction and power as the Court of Chancery in England possessed on the tenth day of June, one thousand eight hundred and fifty-seven, as a Court of Equity to administer justice in all cases in which there exists no adequate remedy at law. 7 Wm. IV., ch. 2, sec. 2; 16 Vic., ch. 159, sec. 21; 13 & 14 Vic., ch. 50, sec. 4; 20 Vic., ch. 56, sec. 1; 12 Vic., ch. 64, sec. 8. (*t*)

(b) FRAUD.

Generally.—It has been said that the court has never laid down, as a general proposition, what shall constitute fraud, (*Mortlock v. Euller*, 10 Ves. 806,) or any general rule beyond which it will not go upon the ground of fraud. (*Lawley v. Hooper*, 8 Atk. 279.) *Lord Hardwicke* has said, "As to relief against frauds, no invariable rules can be established. Fraud is infinite, and were a court of equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes, which the fertility of man's invention would contrive."

As to the jurisdiction to relieve against every species of fraud, the words of *Lord Hardwicke* are most important. This learned judge has, in *Chesterfield v. Janssen*, 2 Ves. 155, given an enumeration of the different kinds of fraud, against which a court of equity will relieve. *Lord Eldon*, too, has illustrated the same proposition in *Fullagar v. Clark*, 18 Ves. 483.

It must, however, be borne in mind, that fraud may be waived, as where a vendee of real estate after having discovered fraud, nevertheless continued to deal with the property as his own, he was held to have disentitled himself to relief. (*Bown v. West*, 1 Grant's E. & A. 117; 2 U. C. Jur. App. 47, 69, 70; *s. c.*, in court below, 1 U. C. Jur. 2, 383.)

Where the courts of law have competent jurisdiction a court of equity will not interfere, as where a release of a debt had been obtained fraudulently, it was held that a bill would not lie to set aside such release, as the creditor might sue at law for the debt, and if the release was pleaded, he might reply, fraud. (*Harris v. Beatty*, 5 U. C. L. J. 18.)

See *Taylor v. Shoff*, 4 Grant, 261, as to directing an issue to try the question of fraud on a bill to set aside a deed.

Misrepresentation and concealment.—Where a party had bought forty-seven acres of land and had paid for and taken a conveyance thereof, and afterwards discovered that forty-four acres of it were under water, a bill filed by him against the vendor was dismissed, with liberty to file another. The plaintiff charged fraud, but no evidence of any fraud either by misrepresentation or concealment being given, and the defendant appearing to have been as ignorant of the nature of the property as the plaintiff, the case was treated as one of mutual mistake and not of misrepresentation and concealment. The case was one of doubt, and the bill relied wholly on the imputed fraud and not on the mutual mistake, hence permission was given to file a new bill. (*Clark v. Burnham*, 2 Grant, 644.)

In *Baby v. Cavanagh*, 5 Grant, 378, which was a suit instituted for the purpose of avoiding a lease granted by one of the plaintiffs to the defendant on the ground of fraud and misrepresentation, the defendant by his answer denying all the charges of fraud, but the tendency of the evidence strongly corroborating the statements in the bill the court set aside the lease. *Esten, V. C.*, remarked that, "Misrepresentation consists in the suppression of what is true as well as in the statement of what is false, and although the parties to contracts must protect their own interests and gain for themselves the information necessary for that purpose, yet if one party will take upon himself to make a representation to the other he must adhere to the truth in that representation; this duty the defendant did not perform, he made a representation to the plaintiff to induce him to grant the lease in question, and in so doing suppressed a material fact, the suppression of which rendered his statement untrue in substance although perhaps true in the letter."

As to a party being bound by a representation made by him (whether innocently or not) which turns out to be incorrect; see *Chapin v. Clarke*, 7 Grant, 75; 5 U. C. L. J. 114.

Representations made in respect of matters the subjects of the contract, which are objects of sense, and as to which an intending purchaser ought in prudence to have examined for himself, however, no ground for relieving the purchaser from his contract. (*Crooks v. Davis*, 6 Grant, 317.)

Where a vendor had misrepresented the state of the title and had induced the purchaser to give the full value of the land, the court refused to enforce the contract. (*Leslie v. Preston*, 7 Grant, 434.)

Where the owner of an estate knowing his rights stands by and allows a third person to appear as the owner and to enter into a contract as such, the owner will be bound by it, (*Davis v. Snyder*, 1 Grant, 134,) and so even though such owner be an infant. (*Leary v. Rose*, —, V. C., April 1862, not reported.) And where a person in order to purchase lands sold at sheriff's sale for taxes consented to representations which he knew to be untrue, and which had the effect of preventing competition, and so was enabled to purchase at less than the value of the land, the sale was declared void. (*Foy v. Merrick*, 8 Grant, 323.) See also *Henry v. Burness*, 8 Grant, 345; *Massingberd v. Montague*, 9 Grant, 92; *Davis v. Clark*, 8 Grant, 358.

See as to misrepresentation, concealment, and inadequate consideration in a suit to set aside a deed for fraud; *Whitla v. McIntosh*, 2 U. C. Jur. 10; and as to waiver, *Bown v. West*, 1 U. C. Jur. 2, 303; affirmed on appeal, 1 Grant, E. & A. 117; 2 U. C. Jur. App. 47.

Frauds on creditors.—A debtor in order to compromise with his creditors offered a mortgage on property which he represented as belonging to a person who desired to assist him, the mortgage was accepted, but it was afterwards discovered that prior to the execution of the mortgage the debtor had obtained a conveyance of the property to himself; held that such conveyance was under the circumstances subject to the mortgage. (*Fraser v. Sutherland*, 2 Grant, 442.)

In *Rosenburgher v. Thomas*, 3 Grant, 635, the plaintiff made a promissory note in favour of his father-in-law, which the bill alleged had been given with the express understanding that the principal should never be called in by the payee, notwithstanding which an action was afterwards brought by him on the note and judgment recovered; the plaintiff thereupon executed a conveyance of his real estate to a third party in order to defeat the judgment at law, a bill was filed by the grantor to have the grantee declared a trustee for him or for payment of the alleged purchase money, a demurrer to this bill for want of equity was allowed. *Blake, C.*, said, "here there was a fraudulent intent to defeat a just judgment concurred in by both these parties, and a deed duly executed and delivered in pursuance of it. There is no doubt that when two persons agree to commit a fraud neither of them can expect any assistance from a court of law to relieve him against the consequences of it, the moment the purpose to defeat the policy of the law by fraudulently concealing that this was his property is admitted, it is very clear that he ought not to be heard in this court to say that it is his property."

So where property was conveyed to a trustee for the purpose of disappointing creditors, and afterwards the person claiming to be beneficially interested filed a bill for a conveyance to himself, under these circumstances the bill would have been dismissed, had not the defendant by his answer admitted that he was a trustee, and had it not appeared that the wife who was not a party to the suit was entitled to the beneficial inheritance. (*Phelan v. Fraser*, 6 Grant, 336.)

So where a mortgagor conveyed his equity of redemption to a trustee to disappoint creditors, and the equity of redemption was afterwards sold under *fi. fa.* lands, the purchaser at such sale was declared entitled to have the conveyance to the trustee set aside, and to redemption. (*Beaman v. Pomeroy*, 6 Grant, 586.) See, however, *contra*, where the purchaser under the *fi. fa.* lands was merely a nominal one for the consideration of five shillings. (*Wilson v. Shier*, 6 Grant, 630.)

In *Prentiss v. Brennan*, 4 Grant, 148, divers conveyances executed by the defendant shortly before the commencement of the suit were declared fraudulent and void within 18th Elizabeth, ch. 5.

Where a person whose chattel property when sold by the sheriff was insufficient to pay the executions lodged against it, made a settlement of the only real estate he had in trust for his wife and children, it was held that the settlement was fraudulent and void under the same statute. (*Goodwin v. Williams*, 5 Grant, 639.)

A conveyance may be fraudulent and void as against creditors, although no debt may be in existence at the time, if made in contemplation of becoming indebted; where therefore, the circumstances attending a transfer of real estate from one brother to another were such that the court felt satisfied that a jury would have arrived at the conclusion that the sale was colourable and fictitious, and made for the purpose of defrauding creditors, the deed was declared void at the instance of a creditor of the assignor, the amount of whose claim was ordered to be paid in one month, or in default that the property in question should be sold. (*The Bank of British North America v. Rattenbury*, 7 Grant, 383.) But the fact that a simple contract creditor has sued out a writ of attachment against an absconding debtor, does not afford any ground for coming to a court of equity to have a conveyance alleged to be fraudulent as against the creditors of the debtor set aside; before the court can be relied upon to do so, the creditor must establish his right to recover at law. (*Whiting v. Lawrason*, 7 Grant, 603.)

The fact that the debtor defends one action brought against him by the creditor, and allows judgment by default for want of appearance in another suit, is not such an undue preference of one creditor as will render the judgment void under Cons. Stats. U. C., cap. 26, secs. 17 & 18; (*Young v. Christie*, 7 Grant, 312.)

As to fraudulent assignment for benefit of creditors, see *McDonald v. Putnam*, 7 Grant, 395; 5 U. C. L. J. 255; *Taylor v. Mabley*, 6 Grant, 570; *McMaster v. Clare*, 7 Grant, 550; 6 U. C. L. J. 160. *McDonald v. Putnam*, as to one point, that a release clause does not of itself render an assignment made before the last mentioned statute invalid, has been overruled in *The Bank of Toronto v. Eccles*, 10 U. C. C. P. 282, affirmed on appeal, 7 U. C. L. J. 43, and 8 U. C. L. J. 208.

Frauds on persons peculiarly liable to imposition.—The court in this province will exercise jurisdiction to relieve against this species of fraud, as in cases of deeds made by persons of old age and weak intellect, without due deliberation and for inadequate consideration. See *Wright v. Henderson*, 1 U. C. Jur. 2, 304, 309; *Crafford v. McDonagh*, 5 U. C. L. J. 187. In the latter case the bill was dismissed; the plaintiff failing to prove fraud or his own ignorance or illiterateness.

Also in the case of fraud exercised upon habitual drunkards and persons in a state of intoxication; (*Nevills v. Nevills*, 6 Grant, 121;) there should, however, be evidence of some undue advantage having been taken. (*Clarkson v. Kitson*, 4 Grant, 244.) See also *Schofield v. Tummonds*, 6 Grant, 568; where a bill for specific performance of a contract entered into by an intoxicated person for an exorbitant consideration was dismissed.

The law of the court in England respecting alienations by expectant heirs and reversioners applies in this province, such persons requiring protection from designing men. The state of the province with regard to the fluctuating value of land merely requires that the rule should be applied with caution. (*Morey v. Totten*, 6 Grant, 179, 180.)

See *Vallier v. Lee*, 2 Grant, 606, as to the case of a deed made by a party on bail on a charge of felony, and as to setting aside the same for undue influence and inadequacy of consideration; and see *Fenton v. Cross*, 7 Grant, 20, as to undue influence exercised by husband over his wife respecting appointments made by her under a power.

Voluntary deeds.—A prior voluntary bond held void as against a subsequent purchaser for value, though *with notice*. (*Osborne v. Osborne*, 5 Grant, 619.) As between two voluntary settlements the first prevails, and the court will entertain a suit for cancellation of the subsequent settlement, as it is not upon the face of it void. (*Houlding v. Poole*, 2 Grant 689, 690; *School Trustees v. Farrell*, 5 U. C. L. J. 280.) Until a deed alleged to have been obtained by fraud is declared void, it must be deemed a valid and subsisting instrument. (*Rogers v. Rogers*, 2 Grant, 137.)

(c) ACCIDENT.

Accident as remediable in equity, may be defined to be an unforeseen and injurious occurrence, not attributable to mistake, neglect, or misconduct. The jurisdiction of the court arising from accident in the general sense already suggested is a very old head in equity and perhaps coeval with its existence. (*Armitage v. Wadsworth*, 1 Mad. 189.) The jurisdiction being concurrent, will be maintained only, first, when a court of law cannot grant suitable relief; and secondly, when the party has a conscientious title to relief. Both grounds must concur in the given case, for otherwise a court of equity not only may, but is bound to withhold its aid.

See as to accident *Counter v. McPherson*, 1 U. C. Jur., 2-22, where premises were burnt pending an agreement for a lease, which however had not been completed, and it was held that the damage should fall upon the lessor, though the lessee had entered.

MISTAKE.

Mistake is sometimes the result of accident in its large sense, but as contradistinguished from it, it is some unintentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence. It is that result of ignorance of law or of fact which has misled a person to commit that, which if he had not been in error, he would not have done. (*Jeremy Eq. Jur. B. 3, Pt. 2, 358*.) Mistakes are ordinarily divided into two sorts, mistakes in matter of law and mistakes in matter of fact.

The case of *Gillespie v. Grover*, 3 Grant 558, is the first reported case occurring in our court under this head. The case presented by the bill was, that a debtor made a conveyance to a trustee for the benefit of his creditors of all his lands and a schedule annexed to the deed purported to contain the whole thereof; that various lands belonged at the time of the execution of the assignment to the defendant Foley, and which ought to have been specifically included in it, were omitted from it by mistake or excluded from it through fraud, and it insisted that the parties claiming the benefit of this transaction were entitled to have this mistake rectified, or the agreement in this respect performed, and the intention of the parties completely carried into effect. The court held that a bill would lie to correct the schedule on the ground of fraud or mistake.

In *Allan v. Thorne*, 3 Grant, 645, a deed prepared and executed in Lower Canada through misapprehension of the law of Upper Canada did not contain the usual and necessary words of inheritance for the conveyance of the fee simple of the land included in it. The court rectified the instrument.

In *Russel v. Davey*, 6 Grant, 165, the court rectified a mortgage, and decreed foreclosure of the same as corrected on the ground of mistake. A reference to this case is important as deciding on the question of the evidence necessary for obtaining such relief.

In *Cottingham v. Boulton*, 6 Grant, 186, the owner of the west half of a lot supposing himself the owner of the *east* half and not the *west* half, contracted with the owner of other lands to exchange for these the east half, and the east half was conveyed accordingly, he filed a bill to compel the other party to accept a conveyance of the west half, and specifically perform the contract by conveying the lands agreed to be given for the east half, alleging mistake in the insertion of east instead of west, it appeared that the two halves were of about equal value, and that the defendant had no personal knowledge of either, but as the contract was for the east half, and the mistake was that of the plaintiff alone, the court held that the west half could not be substituted for the east half, the defendant was not bound to take a parcel of land which he did not contract for, and as it would be making a new contract between the parties, the court refused the relief asked.

In *Williams v. Felker*, 7 Grant, 345, which was a case for the rectification of an alleged error in a mortgage, by the insertion of £225 instead of £125, the defendants denying the fact of any mistake having occurred, and the evidence of the conveyancer not being sufficiently satisfactory the court refused the relief, it being held that to induce the court to vary a written instrument on the ground of alleged mistake the evidence must be of the strongest character. The parol evidence in this case was strongly in favour of the bill, but it was entirely parol and not borne out by circumstances or conduct.

In *Chapin v. Clarke*, 7 Grant, 75; 5 U. C. L. J. 114; which was a case for reforming a deed in order that it might include a larger amount than that mentioned in the deed, the court dismissed the bill; the deed was an assignment for the benefit of creditors, some of whom had preferred claims and were to be paid in full, the claim of one of them was stated in the schedule by the debtor to be £3500 or thereabouts, and the deed was executed; it was afterwards ascertained that the true debt was £5062, and the plaintiff depended upon the words "or thereabouts," for the purpose of correcting the deed and including the enlarged demand.

As to rectification of deed, see also *Cotton v. Corby*, 7 Grant, 50; affirmed in 8 Grant, 98; this case is important as laying down the principle that in suits for the rectification of deeds, the court is in the habit of allowing great weight to statements made by the answer in opposition to the relief sought by the bill, and the cases above cited proceed very generally upon this principle.

As to mistake, see further, *Blackwood v. Paul*, 4 Grant, 555, reversing same case in court below, 3 Grant, 394; *Merritt v. Ives*, 2 U. C. Jur. 25; *School Trustees v. Farrell*, 5 U. C. L. J. 230.

It is noticeable that fraud and accident are only mentioned under this sub-section of general jurisdiction as grounds for relief, it is presumed, however, that mistake was intended to have been included, and that if not specially referred to, it nevertheless will be included under the general section, number 10. For convenience of classification the note thereon is inserted in this place.

(d) TRUSTS.

Generally.—Trusts are of different kinds: First. General, as where the legal estate merely is vested in the trustee, and the *cestui que trust* is in equity entitled to the rents and profits, and has power to dispose of the lands. Second. Special, such as a trust to accumulate, to sell and distribute, or convert into other funds, with or without the consent of the *cestui qui trust*. And thirdly. All trusts may be divided and executed, or executory trusts.

As a general principle in dealing with trust estates, courts of equity are governed by the same rules as courts of law are with respect to legal estates. (Sand. Uses, 270.)

Trust estates are in equity assignable. (Warmstre v. Tanfield, 1 Ch. Rep. 29.)

As to the difference which exists between the merger of legal and equitable estates, see Forbes v. Moffatt and note Tudor's leading cases, Real P. 763.

As to trusts executed and executory, Shelley's case and note. (*Ibid.* 448.)

As to the law of trusts, see Lewin on Trusts and Hill on Trustees.

Trusts arising under wills are exclusively within the jurisdiction of the court of equity, and indeed this is the case with most matters of trust. Story divides trusts into three kinds, Express, Implied, and Constructive Trusts.

A trustee dealing with his *cestui qui trust* is bound to communicate all facts material to the transaction. (Hope v. Beard, 8 Grant, 380.)

The principle that when a trustee expends his money upon the estate and thereby increases its value, the property will not be wrested from him without re-paying him the expenditure by which the estate has been substantially improved, acted upon in the case of an infant *cestui que trust*. (Bevis v. Bolton, 7 Grant, 89.)

See as to compelling trustee to account and for re-conveyance, Kerby v. Kerby, 5 Grant, 587; Place v. Spawn, 7 Grant, 406.

A deed of land in trust for an alien (executed before 12 Vic., ch. 197) and mortgages subsequently created by the alien held good in equity, and by said statute, sec. 12, aliens are enabled to hold real estate in this province as fully and effectually as natural born subjects. (Murray v. Heron, 7 Grant, 177.)

A deed void as to an illegal trust as for a lottery was held valid as to the other trusts therein declared. (Goodeve v. Manners, 5 Grant, 114.)

Breach of trust and liability of trustee.—In Attorney-General v. Goderich, 5 Grant, 402, it was held that a corporation acting as a trustee is as amenable to the jurisdiction of equity as an individual, and that any alienation of the land the subject of trust was a breach, and the land should be re-conveyed, and if no conveyance had been actually executed its execution would be restrained. So in Drake v. The Bank of Toronto, 9 Grant, 116; 8 U. C. L. J. 320; it was held that the directors and managers of incorporated banks are quasi trustees for the general body of creditors, and if any loss should accrue to the bank by their infringing the statute against usury, they would be liable individually to make good the loss to the bank. See further as to breach of trust and liability of trustees; Chandler v. Ford, 6 Grant, 607, reversed on appeal; 8 Grant, 85; 6 U. C. L. J. 182; Nowlan v. Logie, 7 Grant, 88; Hope v. Beard, 8 Grant, 380; Wiard v. Gable, 8 Grant, 458; (which decides that an executor or trustee who has been guilty of negligence merely in omitting to invest moneys will be charged with interest at six per cent;) Davidson v. Grange, 4 Grant, 317. As to constructive trusts, see Dougall v. Lang, 5 Grant,

292; Willard v. McNab, 2 Grant, 601; Hutchinson v. Hutchinson, 6 Grant, 117; Parsons v. Kendall, 6 Grant, 408.

Appointment of new trustees.—See as to this Lyon v. Radenhurst, 5 Grant, 544; Tripp v. Martin, 9 Grant, 20.

Trusts for the benefit of creditors.—A conveyance of property for the benefit of creditors may create a valid and irrevocable trust, although none of the creditors are party or privy to the deed, and when in its inception it is not so, subsequent dealings or communications between the debtor or his trustees, and the creditors may render the trusts irrevocable and give them an indefeasible interest under the deed. (Goodeve v. Manners, 5 Grant, 114, 123.) See also Pyper v. McDonald, 5 U. C. L. J. 162; where it is held that a creditor who does some act which is a clear assent to the deed, is thereby bound, and is entitled to come in under it though he may not have executed it within the time limited. See further as to trusts for creditors, McKay v. Farish, 1 Grant, 333; Taylor v. Mabley, 6 Grant, 570; Joseph v. Bostwick, 7 Grant, 332; McDonald v. Putnam, 7 Grant, 395; McMaster v. Clare, 7 Grant, 550; Metcalf v. Keefer, 8 Grant, 392; 7 U. C. L. J. 270; (as to remunerating assignees;) Hill v. Rutherford, 9 Grant, 207; Bank of Toronto v. Eccles, 10 U. C. C. P. 282; affirmed on appeal, 7 U. C. L. J., 43; 8 U. C. L. J. 268; (overruling McDonald v. Putnam supra; and deciding that a release clause does not of itself render an assignment made before 22 Vic. cap. 96; invalid;) Harris v. Beatty, 5 U. C. L. J. 19; and Wood v. Brett, 9 Grant, 78; this last case is important as to parties.

Costs.—Where trustees came into court for the purpose of having the trust carried into execution, and failed to shew the existence of any circumstances of difficulty in winding up the affairs of the trust the court refused them their costs of the suit. (Cummings v. McFarlane, 2 Grant, 151.) The court had this subject in consideration in Baldwin v. Crawford, 1 Grant, 202, and adhered to the opinion there expressed.

Where a trustee set up an improper claim to the property the subject of the trust, and a bill was filed to compel him to deliver up possession and account, the court charged him with the costs of the suit. (Fisher v. Wilson, 2 Grant, 260.)

Where a trustee is required by his *cestui que trust* to convey to the latter the trust lands, the *cestui que trust* must pay all costs, charges, and expenses, properly incurred in relation to the trust, and a decree for conveyance will only be made on payment of such costs, &c., to the trustee. The *cestui que trust* must solve all reasonable doubts suggested by the trustee as to the course he is desired to pursue. (Rowell v. Hayden, 2 Grant, 557.)

A trustee having refused to allow his name to be used as a plaintiff was refused his costs of defence, although no blame attached to him in other respects. (Ellis v. Ellis, 7 Grant, 102.)

(c) EXECUTORS AND ADMINISTRATORS.

The executors are contained in the person of the testator, in respect of all contracts made by him, except those depending on his personal skill, see remarks of *Burns Perke* in Wills v. Murray, 4 Exch. 866; and to quote the words of *Lord King*, they are legally entitled to the personal estate, they have a legal title, and can give a good discharge; on this principle an executor can of his own authority alone file a bill to obtain any part of the testator's property from a person withholding it. (Jones v. Gcodechild, 3 P. W. 34.)

By accepting probate, the executor becomes liable to perform the duties of the office. (James v. Fearson, 1 Y. & C. C. C. 376.)

A general charge in a bill, that the defendant, an executrix and trustee, is committing waste on the testator's property, without specifying any act of waste, is not sufficient to sustain an injunction or receiver; (*Sanders v. Christie*, 1 Grant 187:) and where a bill was filed in 1846 against executors, charging them with improper conduct in the management of the estate, and the answers were all filed within a year afterwards, and no further proceeding was had thereon until the beginning of 1851, when the plaintiffs moved on affidavit for the appointment of a receiver of the real and personal estate; the court, under the circumstances, refused the application with respect to the personal estate, as no new grounds for the proceeding were stated in the affidavit filed, but granted the motion in respect of the real estate. (*Mencham v. Draper*, 2 Grant 316.) Where a bill was filed by devisees against the executors of their testator's will, alleging the inability of the executors to attend to the trusts of the will on account of bodily infirmities, and praying for the appointment of a trustee or trustees in their place, the court dismissed the bill on the ground that the jurisdiction to interfere in such a case belonged to the probate and surrogate courts, and not to the Court of Chancery, and inasmuch as the executors had been brought before the court without any fault on their part the bill was dismissed with costs. (*Corrigan v. Henry*, 2 Grant, 310.) Where an executor who has renounced probate of the will is made defendant to a suit, the bill can only be dismissed as against him with costs. (*Stinson v. Stinson*, 2 Grant, 508.) Where an executor or administrator applies for an order to administer the estate of the testator or intestate, the account will be directed to be taken of what he has received, or which but for his wilful default he might have received. (*Ledgerwood v. Ledgerwood*, 7 Grant, 684.)

But where an order for the administration of a deceased person's estate is granted upon the application of any person beneficially interested therein, the decree will not contain a direction to enquire as to wilful neglect and default. (*Harrison v. McGlashan*, 7 Grant, 531.) An executor has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the court. There must be some real question to submit to the court, or some dispute requiring interposition, when he will be entitled to his costs; otherwise he will not receive them, and if it should appear that his conduct has been *malâ fide* or unreasonable, he will be ordered to pay the costs of the defendant; (*White v. Cummins*, 3 Grant, 602;) and where an executor has been dealing with the estate improperly the court will charge him with the costs of the suit, with interest on the balances from time to time in his hands, and direct the account to be taken with annual rests. (*Ersine v. Campbell*, 1 Grant, 570.) But an executor is entitled to interest on moneys advanced by him out of his own means and properly expended in the management of the estate. (*Menzies v. Ridley*, 2 Grant, 544.) An executor has a right to retain a debt barred by the Statute of Limitations: but *query*, where the personal estate of a testator is exhausted, has the executor a right to retain such a debt out of the proceeds of real estate? (*Crooks v. Crooks*, 4 Grant, 615.) As to payment of legacies by executors, and as to what is admission of assets, see *Coleman v. Whitehead*, 3 Grant, 227. As to purchase by an administrator for his own benefit, and his liability as a trustee consequent thereon, see *Foster v. McKinnon*, 5 Grant, 510; *Lamont v. Lamont*, 7 Grant, 258.

The case of *Crooks v. Torrance*, 6 Grant, 518, affirmed an appeal, 8 Grant, 220, as affecting the question of liability of executors is important. It appears that by an agreement entered into between the executors of an estate in Lower Canada and the residuary legatees, the former agreed to settle a particular legacy and indemnify the residuary legatees from it. According to the laws of that part of the province, interest is not recoverable upon a legacy until suit brought to compel payment thereof, unless an express promise to pay interest is shown; and the legatee referred to having brought an action in that province to enforce payment of the legacy,

alleging an express promise on the part of both the executors and residuary legatees to pay such interest, in which action the executors denied such promise, and a verdict was rendered in their favour, but the residuary legatees allowed judgment to go by default, and afterwards filed a bill in the Court of Chancery for Upper Canada to compel the executors to indemnify them against the liability they had incurred. The court refused the relief prayed, and dismissed the bill with costs.

Where executors are charged with misconduct a bill must be filed, (*Re Babcock's estate*, 8 Grant, 409,) and see this case generally as to the duties of executors as accounting parties and in their representative character.

If a cause of action accrues in the life-time of the testator the statute begins to run against his estate though there is no executor or administrator; but where it does not begin to run until after his death then the time does not begin to run until there is a personal representative who can sue and be sued. (*Grant v. McDonald*, 8 Grant, 468.)

As to allowing executors and administrators for their care and trouble, see *McLennan v. Heward*, 9 Grant, 178; 9 U. C. L. J. 18; on further directions, 9 Grant, 279.

Creditors' suit.—As to representation and parties, see *Michie v. Charles*, 1 Grant, 125; but in a creditors' suit against the devisees of a debtor it is not indispensable that the heir-at-law should be a party. (*Fenny v. Priestman*, 1 Grant, 149.) As to receiver in a creditors' suit and the terms upon which an application for a receiver will be granted, see *Sanders v. Christie*, 1 Grant, 187. As to sale of lands, see *Heal v. Harper*, 2 Grant, 695; and where there was a settlement in trust for the wife, *Pemberton v. O'Neil*, 2 Grant, 263. Where in a creditors' suit to whose estate administration *ad litem* had been taken, the bill alleged that there were no personal assets, and the parties interested in the real estate had suffered the bill to be taken against them *pro confesso*, and did not appear at the hearing, the court made the usual decree, without requiring a general administration to be first obtained. (*Dey v. Dey*, 2 Grant, 149.)

(f) CO-PARTNERSHIP AND ACCOUNT.

Generally.—Courts of equity now exercise a full concurrent jurisdiction with courts of law in all matters of partnership; and indeed it may be said that, practically speaking, they exercise an exclusive jurisdiction over the subject in all cases of any complexity or difficulty.

The remedial justice administered by courts of equity is far more complete, extensive and various, adapting itself to the particular nature of the grievance, and granting relief in the most beneficial and effectual manner where no redress whatsoever, or very imperfect redress, could be obtained at law. This remedial justice is not confined to cases where courts of equity will interfere by injunction only, but is extended to cases for the effectual settlement of all the accounts of the partnership, so that all its affairs may be wound up, and they may take steps for this purpose which courts of law are inadequate to afford. (*Story's Eq. Jur.*, § 683, *et seq.*)

Taking partnership accounts.—The proper method of taking partnership accounts in a very special case is discussed and illustrated in *Davidson v. Thirkell*, 8 Grant, 380; and as to taking accounts consult also the following cases: *Garven v. Allan*, 8 Grant, 238; *Strathy v. Crooks*, 6 Grant, 162; where it was held that an executor was bound to make up the accounts from the books of the partnership in his possession as between his testator and the surviving partner; *McGregor v. Anderson*, 6 Grant, 354, as to the lien of a retiring partner on the profits; *Bilton v. Blakeley*, 6 Grant, 575, as to the rights and liabilities of the surviving partner; and *O'Lone v. O'Lone*, 2 Grant, 125.

Limited partnerships, Con. Stats. Can., ch. LX., p. 689.—Members of a limited partnership may act in such a manner as to create a general partnership not only as to third persons, but also *inter se*. (*Patterson v. Holland*, 6 Grant, 414; 7 Grant, 1.) This case turns to a great degree upon the proper construction of this statute, and is of considerable importance; the question was decided upon principle in the absence of any cited authorities.

Miscellaneous cases as to partnership.—Where a sale is made under execution issued against one partner, the assignee is only entitled to such partner's interest or share in the assets after payment of the partnership debts, and that, too, even when the debt originally was due from the partnership to the execution creditors. (*Partridge v. McIntosh*, 1 Grant, 50,) which also decides that in any suit in equity to wind up the affairs of the partnership, the partner whose interest has been so sold is nevertheless a necessary party. (*Ibid.* p. 54.) So the personal representative of a deceased partner is a necessary party. (*Baxter v. Turnbull*, 2 Grant, 521; *Sykes v. The Brockville and Ottawa Railway Co.*, 9 Grant, 9.) See *Newton v. Doran*, 1 Grant, 590; 3 Grant, 853; *Prentiss v. Brennan*, 1 Grant, 484; *Haggart v. Allan*, 2 Grant, 407; *Smith v. Crooks*, 3 Grant, 321; *Wylie v. Wylie*, 4 Grant, 278; *Wallace v. James*, 5 Grant, 163; *Mair v. Bacon*, 5 Grant, 388; *Bilton v. Blakely*, 7 Grant, 214; *Proudfoot v. Bush*, 7 Grant, 518; and *Harris v. The Dry Dock Co.*, 7 Grant, 450, as to partnership generally.

A member of a partnership cannot bind a copartner for transactions out of the usual scope of the business of the partnership, nor for things which though done by it are unusual or of rare occurrence. (*Fraser v. McLeod*, 8 Grant, 268.) *Spragge, V. C.*, in an elaborate judgment reviews at great length the law and authorities on this subject.

One partner of a mercantile firm has no power either during the existence, or after the dissolution of a partnership, to make an assignment of the property and effects of the firm to a trustee for the benefit of creditors. (*Stevenson v. Brown*, 9 U. C. L. J. 110.)

Judgments recovered against two out of three members of a partnership firm are available only against what may appear upon winding up the partnership to belong to the two judgment debtors. (*Stanbury v. Milliken*, 8 U. C. L. J. 134.)

The admissions of one partner that a third person was jointly interested with himself and his copartners, are not evidence against the latter to prove such joint interest. (*Carfrae v. Vanbuskirk*, 1 Grant, 589.)

Corporations.—As to contracts by corporations, and as to their validity or otherwise without the corporate seal, see *Brewster v. The Canada Co.*, 4 Grant, 443; *Whitehead v. The Buffalo and Lake Huron Railway Co.*, 7 Grant 351; affirmed on appeal, 8 Grant, 157. *Smith v. The London Gas Co.*, 7 Grant, 112. A court of equity has jurisdiction to set aside an election of directors or corporate body by persons who are subscribers nominally and not *bonâ fide*, and a suit for that purpose may be brought by some of the shareholders on behalf of all, and need not be in the name of the corporation itself. (*Davidson v. Grange*, 4 Grant, 377.)

(g) MORTGAGES.

As to deeds absolute in form but intended to operate as security.—In *LeTarge v. DeTuyll*, 1 Grant, 227; 3 Grant, 369, 595; the principal question was whether parol evidence could be received to show the real nature of the transaction, and the court allowed redemption admitting parol evidence to show that the conveyance was intended to operate as security only. *Spragge, V. C.*, said, "it is not necessary

in this case to decide whether parol evidence is in all cases admissible to show that a deed of conveyance absolute in its terms was intended to operate as a mortgage, because there appears upon the evidence to have been such a dealing between the parties upon the faith of the contract sought to be established as properly to admit evidence as to what the real contract between the parties was, and I am of opinion that the plaintiff is entitled to relief, because he has shown such dealing as admitted evidence of the real contract, I put it upon this ground because I desire not to be understood as assenting to the proposition of his lordship the Chancellor, (*Blak.*) that upon the question 'mortgage or no mortgage,' parol evidence is always admissible, at present I incline against the admissibility of the evidence." This case was remarked upon in *Howland v. Stewart*, (*in appeal*), 2 Grant, 71, and in this case parol evidence of an alleged agreement was held inadmissible. *LeTarge v. DeTuyll*, was also approved of in *Greenshields v. Barnhart*, 3 Grant, 1. In *Holmes v. Matthews*, (3 Grant, 379, reversed on appeal; 5 Grant, 1; s. c. in Privy Council, 5 Grant, 108.) it was held that an unsigned memorandum of the transaction made at the time for the use of the parties, by the attorney's clerk who drew the deed for them, was insufficient to let in parol evidence.

In *Barnhart v. Patterson*, 1 Grant, 459; reversed in *Greenshields v. Barnhart*, 3 Grant, 1, it was held that the possession by the tenant of the mortgagor was not such a possession by him as would affect a purchaser from the mortgagee, with notice of the interest of the mortgagor. (Affirmed on appeal to the Privy Council, 5 Grant, 99; 9 Moore P. C. 18.) See further *Ferrass v. McDonald*, 5 Grant, 310; *Hollywood v. Waters*, 6 Grant, 329; where it was held (overruling *Soden v. Stevens*, 1 Grant, 348; *Waters v. Shade*, 2 Grant, 457) that constructive notice by possession is sufficient to postpone a subsequent registered conveyance.

See also *Watson v. Munro*, 5 Grant, 662; 6 Grant, 385; on appeal, 8 Grant, 60; 6 U. C. L. J. 181. The facts of this case are as follows: in October, 1840, the holder of a bond for the conveyance to him of real estate, assigned over the same to a creditor in payment of his demand, the creditor paying at the same time a sum in cash two years after he obtained possession of the property by an action of ejectment against the debtor, who had in the interim been in receipt of the rents. In December, 1855, the debtor filed his bill, stating that though the assignment of his interest was on the face of it absolute, it was in fact made by way of mortgage only, and praying redemption. Issues were directed as to the question of mortgage or no mortgage, (5 Grant 662.) and found in favour of plaintiff, after which, on further directions, (6 Grant 385,) a decree for redemption was pronounced in favour of the debtor, which was reversed on appeal, and bill dismissed with costs. The court of appeal held that such a question is properly one of law, not of fact, and not such as forms a question properly to be tried by a jury.

Walker v. Bernard, (not reported in court below, but decision sustained on appeal, 9 U. C. L. J. 34.) decides the principle upon which parol evidence is admissible. (*LeTarge v. DeTuyll*, *supra*, commented upon and approved of.)

In *Stewart v. Horton*, 2 Grant, 45, parol evidence was admitted on the ground of fraud.

See also *Bullen v. Renwick*, 8 Grant, 342, reversed on re-hearing, 9 Grant 202, as to an absolute sale with a right to re-purchase being held to be a mortgage transaction. This case afterwards came before the court on appeal from the master's report, the master having allowed interest from the time of the advance, a period of seventeen years, the court sustained the appeal, (*Essex*, V. C., 15 April, 1863,) and referred it back to the master to review his report, limiting the allowance of interest to six years before the filing of the bill, in terms of the statute, though the bill to redeem was by the heir-at-law of the mortgagee, and notwithstanding *Elvy v.*

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Norwood, 5 DeG. & Sm. 240; 16 Jur. 493; Sinclair v. Jackson, 17 Beav. 405. See also as to mortgage by absolute deed, Hamilton v. McNab, 1 U. C. L. J. 57.

Sale of equity of redemption—The vendor of an equity of redemption is entitled to indemnity from the vendee against the mortgage debt, the rule of principal and surety being applicable. (Thompson v. Wilkes, 5 Grant, 591; Roberts v. Rees, 5 U. C. L. J. 41; Joice v. Duffy, 5 U. C. L. J. 141); and see Bank of Upper Canada v. Brough, not reported in court below, but reversed on another ground, on appeal, 8 U. C. L. J. 264. And if the vendor is sued at law by the mortgagee on his covenant he will be entitled to his costs of such suit from the vendee. (Roberts v. Rees, *supra*.)

The purchaser of an equity of redemption subject to a charge which is his own proper debt, or which he is under any contract express or implied to discharge, cannot keep such charge alive as against a mesne incumbrance, which by the terms of the contract of purchase, express or implied, the purchaser was also bound to discharge. (Blake v. Beatty, Beatty v. Blake, 5 Grant, 859.)

Where land subject to a mortgage is sold by the sheriff under the statute 12 Vic., ch. 73, the purchaser acquires the title of the mortgagor at the time of registering the judgment. And *query*, whether a stranger purchasing the premises would not be bound to pay off judgment as well as mortgage debts as forming together a portion of the price of the land purchased. (Bank of Montreal v. Thompson, 9 Grant, 51; 8 U. C. L. J. 102; and see 8 U. C. L. J. 220, apparently overruling Pegge v. Metcal, 5 Grant, 628.)

The provisions of the stat. 12 Vic., ch. 73, making equities of redemption saleable under legal process do not apply where the mortgage is created by a deed absolute in form; (McCabe v. Thompson, 6 Grant, 175;) nor where the equity of redemption has been assigned and is in the hands of a party other than the mortgagor. (Bank of Upper Canada v. Brough, 8 U. C. L. J. 264.)

Mortgages for future advances and floating balance—As to cases of this description see *In re Browne*, 2 Grant, 590; Buchanan v. Kerby, 5 Grant, 332; Gibb v. Warren, 7 Grant, 496; Russell v. Davey, 7 Grant, 13.

Miscellaneous cases—Where a mortgage deed stipulated that on default of payment of interest within ten days after the same was payable that the whole principal should become due and a covenant was inserted accordingly, it was held that this was in the nature of a penalty against which the court would relieve, and that if a suit were instituted at law to recover the full amount the court would restrain the action on payment of the interest due. (Knapp v. Cameron, 6 Grant, 559.)

Taking a mortgage for unpaid purchase money (though not signed by the wife of the mortgagor) destroys the vendor's lien for the purchase money, and a subsequent mortgage registered first will take priority. (Baldwin v. Duignan, 6 Grant, 595; 4 U. C. L. J. 232.) See however as to this, in a case where the registry laws did not operate. (Vansickler v. Pettit, 5 U. C. L. J. 41.)

A mortgage was executed in blank, the mortgagor instructing his agent to fill up the blanks as he should find necessary, which he did, and handed it over to the mortgagee, it was held that this was a sufficient execution of the mortgage, and that the same was a valid charge upon the property embraced in the instrument. Montreal Bank v. Baker, 9 Grant, 97.)

The prior registration of a mortgage with a power of sale enables the mortgagee in the proper exercise of such power to sell free from the claim of a purchaser prior in point of time, but who had neglected to register his conveyance. (Daniels v. Davidson, 9 Grant, 173; 8 U. C. L. J. 324.)

As regards the rights of the chartered banks of this province to take mortgages upon real estate by way of collateral security for sums advanced *bonâ fide* in the way of their business, it has been decided that they are so entitled, and the advance of the money and the taking of the security may be contemporaneous. (*The Commercial Bank v. The Bank of Upper Canada*, 7 Grant, 250; affirmed on appeal, 7 Grant, 423.) And they are also entitled to a decree of foreclosure of such mortgage. (*Bank of Upper Canada v. Scott*, 6 Grant, 451.)

Chattel Mortgages.—The mortgagees of chattels, like a mortgagee of real estate, is entitled to a foreclosure in default of payment of the amount secured thereby. Where, however, a party held a mortgage on chattel property, and also mortgages on real estate, the court refused to make a decree for sale of the chattels and of foreclosure as to the realty. (*Cook v. Flood*, 5 Grant, 463.) To enable the assignee of a chose in action to proceed in equity for its recovery, he must shew the existence of some difficulty or obstacle in his way to prevent him from recovering at law. (*Ross v. Munro*, 6 Grant, 431.) See further as to chattel mortgages, *Fisken v. Rutherford*, 8 Grant, 9.

(h) AWARDS.

General charges of partiality against an arbitrator are not sustained by general affidavits, that throughout the arbitration he had evinced a hostile disposition towards the party complaining. (*Burr v. Gamble*, 4 Grant, 626.) See *Hickman v. Lawson*, 8 Grant, 386, as to improper conduct of one of the parties before the arbitrators being sufficient to invalidate the award. An award may be good in part, and bad in part, but although this is the general principle, still where arbitrators found a sum of money due to a creditor, and directed the debtor to pay and the creditor to receive such amount in a certain specified manner, the creditor was not allowed to adopt the award in so far as it found the sum due, and reject that portion of it directing the mode of payment. (*Dalton v. McNider*, 5 Grant, 501.)

A defendant to an action at law pleaded by way of equitable defence an alleged agreement made for valuable consideration to give time by the plaintiff, and a verdict was taken for the plaintiff in that action, subject to be increased or reduced, or a verdict entered for defendant by the award of an arbitrator chosen between the parties. Before the arbitrator had entered upon his duties further than making an appointment for the parties to attend before him, the defendant in the action filed a bill in equity seeking to restrain the proceedings at law, alleging as a ground for that relief the same facts as had been pleaded by him in the action at law. The court refused the relief prayed, and dismissed the bill with costs. (*Pomeroy v. Boswell*, 7 Grant, 163.) It was held in this case that it is a contempt of a court of common law to proceed in the Court of Chancery after a reference to arbitration under an order of that court, which orders the party to perform the award.

As to making an award an order of court, it was held in *Wadsworth v. McDougall*, 5 Grant, 290, that where a case has been referred to arbitration, and an award made, such award must in all cases be made an order of the court before any other order in the cause can be made.

And see as to making an award an order of court, *In re Taylor and Bostwick*, Grant's Cham. 53.

See further as to awards, *Jekyll v. Wade*, 8 Grant, 363; *Ruthven v. Rossin*, 8 Grant, 370.

It is necessary that the witnesses should be examined in the presence of, or at least with notice to all parties, or the award will be set aside. (*Hickman v. Lawson*, *supra*.)

As to setting aside an award as being "*ultra vires*" of arbitrators, see *Gillam v. Cleghorn*, 5 U. C. L. J. 116.

(i) DOWER.

As to dower in equitable estates, the case of *Smith v. Smith* is an important decision. A person equitably entitled to lands (in this case a person who had not paid up his purchase money or obtained a conveyance) created a mortgage thereon, containing a power of sale in default of payment. The power of sale was not exercised until after the death of the mortgagor, afterwards the widow of the mortgagor filed a bill against the purchaser for dower in the mortgaged premises. A demurrer thereto for want of equity was allowed; dower attaching only to such equitable estates as the husband dies seised of; the sale when made having relation to the time of creating the power, and thereby over-reaching the title to dower, which had in the meantime attached. (*Smith v. Smith*, 3 Grant, 451.) A widow's title to dower before assignment, although not transferable at common law, it has been held, may be the subject of sale and conveyance in equity. (*Rose v. Simmerman*, 3 Grant, 598.) A sale of land for taxes under the Wild Lands Assessment Act, destroys the right of the widow of the owner to dower. (*Temlinson v. Hill*, 5 Grant, 231.)

As to dower in unpatented lands where the purchase money has not been fully paid, it was held that a widow was entitled to dower in such lands, whereof her husband died possessed. (*Craig v. Templeton*, 8 Grant, 483.)

As to verbal agreement as to dower. A widow having again married, she and her husband verbally agreed with the devisees, that she and her husband should enjoy a certain portion of the estate during her life, in respect of her dower therein; held, that this was binding on all parties interested as being an agreement not within the Statute of Frauds, a parol assignment of dower being good; (*Park on Dower*, 269; *Rowe v. Power*, 2 B. & P. N. R. 34;) and the court restrained a purchaser of portions of the estate from disturbing the dowress and her husband during her lifetime. (*Leach v. Shaw*, 8 Grant, 494.)

The right to dower being favoured both by common law and equity, equity will assist a dowress by removing out of her way a satisfied, and will allow her to redeem an unsatisfied mortgage. (*Henny v. Lowe*, 9 Grant, 265.)

(k) INFANTS.

Lord *Hardwicke* has said, that as soon as the Court of Wards was dissolved, the jurisdiction devolved upon this court, and infants have ever since been considered as under the immediate care of the Court of Chancery. (*Hughes v. Science*, 2 Eq. Ca. Ab. 756; *Butler v. Freeman*, 1 Amb. 302. (n))

Mr. *Fonblanque*, however, says, (2 *Fonblanque's Eq. Tr.* 232, n.) "Upon the whole, I submit that the general superintendence and protective jurisdiction of the court in the case of infants, as a general jurisdiction, was not even suspended by the statutes of Henry VIII., erecting the court of Wards and Liveries."

Whatever doubt there may be as to the jurisdiction of the Court of Chancery while the Court of Wards was in existence, there can be none as to its jurisdiction since the Court of Wards was abolished by 12 Car. II., ch. 24.

In *re Hodges*, 1 Grant, 289, *Eaten*, V. C., observed, "The fact is, that the act establishing this court conferred on it all the powers then belonging to the Court of Chancery in England, and of course it is immaterial whether those powers were derived from the common law or from statutory enactment. Whatever they were, and from whatever source they were derived, they were communicated by the act

last mentioned to this court." Under the act respecting the appointment of guardians, (Consol. Stats. U. C., ch. 74.) the right of appointment would appear to belong exclusively to the Surrogate court for the county within which any such infant resides; (sec. 1;) it has been held, however, *In re Stannard*, Grant's Cham. 15, that this enactment does not expressly exclude the jurisdiction of the court, which has always been entertained for the appointment of guardians to infants, Chancery having exercised jurisdiction in any case not cognizable at common law is not ousted of that jurisdiction by an act subsequently passed giving to common law courts authority to adjudicate upon similar cases, the rule being that equity having once exercised jurisdiction, cannot be deprived of it otherwise than by an express and positive enactment of the legislature.

See as to appointment of guardians, *White v. Cummins*, 2 Grant, 397, 487; *Anon.*, 6 Grant, 632.

(I) IDIOTS, LUNATICS, AND THEIR ESTATES.

The law not presuming an *idiot* likely ever to attain any understanding, formerly vested the custody of him and his lands in the lord of the fee, but by reason of the manifold abuses by subjects, it was at last provided by common consent that it should be given to the King as general conservator for his people, in order to prevent the *idiot* from wasting his estate, and reducing himself and his heirs to poverty and distress. (17 Edward II., ch. 9.) Before the Court of Wards was erected, says *Lord Hardwicke*, the jurisdiction both as to idiots and lunatics was in Chancery, and after the Court of Wards was abolished by act of parliament it reverted back to the Court of Chancery. The power of the Chancellor as to idiots' or lunatics' estates is derived under the sign manual in virtue of the prerogative of the Crown. The Chancellor, who is usually invested with it, is responsible to the Crown alone for the right exercise of it, and therefore an appeal will not lie to the House of Lords from an order made in lunacy, but must be made to the King in council. (*Sheldon v. Fortescue Aland*, 3 P. W. 107; *Rochfort v. E. of Ely*, 1 Bro. P. C. 460.) The sign manual is a standing warrant to the Lord Chancellor, or any other officer of the Crown, (for the grant is not of necessity to the Chancellor,) to grant the custody of lunatics, and is a beneficial one in the case of idiocy, because the King could not only grant the custody of idiots, but also the rents and profits of their lands. As to this latter point *Lord Redesdale* expresses a doubt (*Lysaght v. Royse*, 2 Sch. & Lef. 153,) and *Lord Nottingham* also in *Prodgers v. Phrazier*, 1 Vern. 9. As to the various authorities in regard to the jurisdiction as to idiots and lunatics and their estates see *Fonblanque* on Eq. 55 *et seq.*

It would seem from these authorities that in the case of a lunatic the King is a more trustee, in the case of an idiot he has a beneficial interest. The difference is fully expounded and clearly explained by *Lord Redesdale*, *In re Fitzgerald*, 2 Sch. & Lef. 436.

The jurisdiction of the court of this province includes that which in England is conferred upon the Lord Chancellor by the Crown under the sign manual. (See *infra* sec. 31.)

Where the estate of a lunatic is of small amount, the court will combine in one reference to the master all the usual enquiries, although the several objects are in England the subject of distinct references. (*Re Duggan*, 2 Grant, 622.)

(m) STAY WASTE.

Courts of equity interfere in cases of waste now by bill, by which not only may future waste be restrained, but timber already felled may be secured for the benefit

of the party entitled, by restraining the party guilty of the waste from removing, and they will not only interpose to restrain legal waste, but also to restrain, what is so held in equity, as felling ornamental trees, &c. ; as to the origin of the jurisdiction as to equitable waste, see *Goodeson v. Gallatin*, Dick. 455.

In the case of waste, says *Mitford*, (Pleading, 133,) courts of equity have in many instances given remedies where the common law has provided none, thus in the case of co-parceners and tenants in common, the court has interfered to prevent the destruction of the property by one co-parcener or one tenant in common, to the injury of the rest.

No injunction will be granted between tenants in common, except in cases of actual destruction, but where a tenant in common of one moiety was trustee of the other, under a will, and was felling timber for his own benefit in breach of his trust, he was enjoined from doing so, it being considered that his powers of disposition and rights of ownership over his own moiety were to be exercised in subordination to his duty as trustee of the other moiety. (*Christie v. Saunders*, 2 Grant, 670, 678.) But a tenant in common upon satisfying the court that the cutting of timber by his co-tenant operates to the destruction of the inheritance, is entitled to an injunction. (*Proudfoot v. Bush*, 7 Grant, 518, 521.)

One tenant in common will be restrained at the suit of a co-tenant from digging earth for bricks on the joint property. (*Dougall v. Foster*, 4 Grant, 319.)

A mortgagor in possession will not be restrained from cutting timber for fuel, fencing, and repairs upon the mortgaged premises, but he will be restrained from felling trees for other purposes if it does not clearly appear that the property, notwithstanding the removal of the timber, will remain of sufficient cash value to satisfy the mortgage debt. *Spragge*, V. C., in his judgment, says, "I think that when the subject of mortgage is a farm, the mortgagor should be restrained from any act which would deprive it of any of the ordinary incidents or conveniences of a farm which it possessed at the time of the mortgage being given." (*Russ v. Mills*, 7 Grant, 145.) In *Cawthra v. McGuire*, 5 U. C. L. J. 142, *Esten*, V. C., followed the rule as it was laid down in *King v. Smith*, 2 Hare, 239, and according to this rule, a mortgagee is entitled to a security of one-third more than the amount due on his mortgage.

A purchaser having entered into possession under his contract, and failing to perform his agreement and meet his payments, was restrained from committing waste or removing or disposing of timber already cut down on the premises; (*Ferrier v. Kerr*, 2 Grant, 668, 670; *Mitchell v. McGaffey*, 6 Grant, 361;) and such an injunction will be granted during the pendency of a suit as to title. (*Christie v. Long*, 3 Grant, 630.)

A mortgagee of a term of years in possession, will, at the suit of the mortgagor, be restrained by injunction from felling timber on the mortgaged premises, although the mortgagee may have obtained the consent of the reversioner to what he is doing; (*Chisholm v. Sheldon*, 1 Grant, 318;) and *quære*, whether the principles of law which settle the rights of termor and reversioner in relation to growing timber in England, are applicable to an estate as to which the beneficial enjoyment of the land is ordinarily attained, and indeed can only be attained through the destruction of growing timber. (*Ibid.*, 319, 320.) Where a lease is granted with right to cut timber, the surrender of the lease also determines the right to cut the timber. (*Stegman v. Fraser*, 6 Grant, 628.)

Though some of the considerations applicable in England to the subject of restraining the cutting of timber operate with very diminished force in this province, yet there is no principle upon which the court of this province can refuse to landed

proprietors in this province the same protection afforded them in England, see *Lawrence v. Judge*, 2 Grant, 302, where an injunction was granted at the instance of the original owner of land and his vendee to restrain sub-vendees who occupied the land, from cutting timber on the land. The owner of real estate sold all the hemlock bark thereon, it was held that the purchaser had under such sale a right to fell the trees. (*Hatch v. Flick*, 5 Grant, 651.)

(n) SPECIFIC PERFORMANCE OF AGREEMENTS.

The jurisdiction exercised by courts of equity in decreeing specific performance of agreements is of a very ancient date, it being referred to in the year book of 8 Ed. IV., 4. B. It is now by a series of decisions established that courts of equity may decree a contract to be performed in specie, at least wherever a court of law would give damages for the non-performance, but which damages would not be an adequate compensation for the non-performance, the party wanting the thing in specie.

An agreement to be decreed in specie, must be fair and reasonable. (1 *Fonblanque Eq.* 30.) This proposition is thus generally stated but, though equity will enforce the specific performance of fair and reasonable contracts where the party wants the thing in specie and cannot have it in any other way, yet if the breach of contract can be or was intended to be compensated in damages, equity will not interfere. It is certainly a general rule that courts of equity will *under particular circumstances* enforce the specific performance of agreements for the non-performance of which the party would be entitled to damages, but as the decreeing of specific performance is in the discretion of the court, it must not be considered as an universal rule, for if the plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance, though perhaps he might at law be subject to damages for not completing his purchase. (*Fonblanque*, 189, 190.) The principles by which the courts of common law direct their decisions on the subject, acknowledge the mutual right of the contracting parties to the specific performance of the agreements they have made, but the mode of proceeding in those courts enables them only to attempt to compel performance by giving damages for non-performance. Here, therefore, the courts of equity interfere, to give that remedy which the ordinary courts would give if their mode of administering justice would meet the evil, by decreeing according to the principles of the common law, as well as of natural justice, specific performance of the agreement. This, however, extends only to contracts of which a specific performance is essential to justice, for if damages for non-performance are all that justice requires, a court of equity will not interfere. In other cases where compelling a specific act is the only complete remedy for an injury, and the ordinary courts can attempt to give this remedy only by giving damages, the courts of equity will interfere to give the specific remedy. It is difficult to reconcile all the cases in which courts of equity have compelled the performance of agreements, or refused to do so, and in some cases where performance has been decreed, it is difficult to reconcile the decisions with the principles of equal justice; (*Mitford pleading*, 141;) the cases are numerous, but may be collected from *Fonblanque's Eq.*, *supra*; *Mitford on Pleading*, 141; *Sugden's Vendors and Purchasers*, 171 *et seq.*; *Fry on Specific Performance*.

This court cannot enforce against the Crown specific performance of an order in council. (*Simpson v. Grant*, 5 Grant, 267.)

The court has authority to declare void a sale of lands by sheriff. (*McGill v. McGlashan*, 6 Gr. 324.) and also has jurisdiction to compel the sheriff to convey lands sold by him under *fi. fa.* (*Witham v. Smith*, 5 Grant, 203; 1 U. C. L. J. 213.) The court has jurisdiction in a proper case to decree compensation for improvements made by the purchaser, but it will not make such a decree where the purchaser can compel specific performance. (*Davis v. Snyder*, 1 Grant, 134.)

Statute of Frauds.—The first case in connexion with specific performance, and with regard to the statute from the Upper Canadian reports, is that of *Farquharson v. Williamson*, 1 Grant, 98, in which case the bill was filed for the specific performance of a contract under circumstances particularly set out in the statement of the case. The court held that the contract in this case was not in writing, within the meaning of the Statute of Frauds, but that sufficient appeared to authorise the court to decree the specific performance of a parol contract upon the terms of the bond in the case referred to, as being partly performed by possession.

So again, a parol agreement partly performed, the purchaser having taken possession, was held to take the case out of the statute. (*O'Neal v. McMahon*, 2 Grant, 145.) So again, where a party was already in possession when the contract was made, and it was the intention of both parties that he should go on making improvements, and he did so with the knowledge of the vendor, without any objection on his part, it was held that the improvements were such an acting on the contract as would take the case out of the statute. (*Jennings v. Robertson*, 3 Grant, 518.)

Payment of the whole of the purchase money in pursuance of a parol contract will not operate as part performance to take the case out of the statute, any more than payment of a portion of the price. (*Johnson v. The Canada Co.*, 5 Grant, 558.)

Possession and cutting timber are acts of part performance sufficient to exclude the statute, (*Sexton v. Shell*, 6 U. C. L. J. 94,) the evidence of the parol agreement should be satisfactory and free from discrepancy, and the acts relied upon as part performance, should be clearly referable to such parol agreement, and to no other. (*Ibid*.) See further as to possession for ten years and erection of fences being held to be part performance sufficient to take a parol contract out of the statute. (*Howcutt v. Rees*, 3 Grant, 527.)

See further as to part performance of a parol contract, *Brown v. Kingsmill*, 1 U. C. Jur. 2, 172; also s.c. on appeal, *Brown v. Smart*, 1 Grant, E. & A. 154-5-6; 2 U. C. Jur. App. 87; where it is said by *Robinson*, C. J., that an admission in the answer of a parol contract would not be sufficient to establish a case in the absence of a writing, if the statute is expressly set up in bar. See also as to part performance, *Wright v. Henderson*, 1 U. C. Jur. 2, 309.

A letter written by a third person and signed by him, addressed to the intended wife and delivered to her by the intended husband with a knowledge on his part of its contents, evidencing an agreement for a settlement by him, was held to be a sufficient writing within the statute signed by the agent of the party to be charged. (*Gillespie v. Grover*, 3 Grant, 558.) *sed quere*.

A paper containing a receipt for part of the purchase money, which clearly ascertains the land to be sold and the amount of purchase money, but omits to state when a portion of the money left unpaid is to be made payable, although it provides that such portion should be secured by mortgage, is a sufficient writing within the statute. (*Devine v. Griffin*, 4 Grant, 603.)

As to sale by sheriff under an execution, where it appeared that no memorandum evidencing the sale had been made or signed by the sheriff, a bill to enforce the sale by specific performance was dismissed, on the ground that such a sale is no exception to the general rule. (*Witham v. Smith*, 5 Grant, 203; 1 U. C. L. J. 213.)

A memorandum endorsed on the conditions of sale and advertisement, and signed by an agent who derived his authority from one of two mortgagees, with a power of sale, (the other mortgagee being absent in England and not concurring in the exercise of the power,) was held to be a sufficiently signed contract within the statute. (*Osborne v. The Farmers' &c., Building Society*, 5 Grant, 328.) See

further as to what is a sufficient signed memorandum within the statute, and how far a paper referred to in such memorandum (e.g., the conditions of sale) can be incorporated with it, *Dalton v. McBride*, 7 Grant, 293, 4, 5, 6.

A paper containing the conditions of sale and the numbers of the different lots, upon which, opposite the lots the respective purchaser's names were written by the auctioneer's clerk in pencil, and afterwards covered with ink, held to be a sufficient signed contract within the statute. (*Crooks v. Davis*, 6 Grant, 320.)

Where an agent authorised to sell for cash, accepted bills from the vendee, held the principal was not bound. (*Brown v. Smart*, 1 Grant, E. & A. 148; 2 U. C. Jur. 80; reversing s. c., 1 U. C. Jur. 2, p. 172.) And see this case generally as to the question who is a duly authorised agent within the statute.

As to time being of the essence of the contract.—As a general rule time is not of the essence of the contract, (*Hook v. McQueen*, 2 Grant, 493-4.) but the tendency of modern authorities is that time is *material*, and that parties should apply promptly for the assistance of the court. (*Ibid*, 494.) Time may, however, be made of the essence, and the contract will then on that head be construed strictly. (*Ibid*, p. 494; *Ewing v. Good*, 1 U. C. Jur. 1, 70.) Where it has been made of the essence, it may be waived, however, as by acquiescing in proceedings taken to complete the title long after the time named, or by treating the contract as still alive in letters or verbal communications with the other party, or his solicitor. (*McDonald v. Garrett*, 7 Grant, 609, 610.)

Laches.—It was held in *O'Keefe v. Taylor*, 2 Grant, 95, that a delay of three years was not under the circumstances sufficient to disentitle the purchaser to specific performance.

Three years delay on the part of a purchaser out of possession in taking steps to enforce his contract, will disentitle him to a decree for specific performance. (*Hook v. McQueen*, 2 Grant, 490; affirmed on re-argument, 4 Grant, 281.) The court considered in this case that under the circumstances of this country a much less delay will in many cases be sufficient to bar a party from obtaining a specific performance of a contract for the sale of land than would be sufficient for the purpose in England. The judgments of the members of the court in this case exhaust the various grounds upon which specific performance will be refused on the ground of laches. See also *Van Wagner v. Terryberry*, 5 Grant, 324, where the delay was nearly four years; *Bell v. Wood*, mentioned, 5 U. C. L. J. 148; *Crawford v. Birdsall*, 8 Grant, 415; and *Chevallier v. Strong*, 8 Grant, 320. In this last case it appears that the contract was entered into in 1852; that the purchaser then left Canada, having put his father in actual possession of the premises, to remain therein until his return; he returned in 1855, and then tendered the purchase money to the widow of the vendor, who refused to accept it or perform the contract; the premises then being unoccupied the purchaser entered into possession, remained therein, cut timber, and exercised other acts of ownership. The court held that the plaintiff was not entitled to any relief, on the ground of laches. The most important part of this statement, i.e., when the occupation by the father was determined, is omitted, and it cannot be gathered either from the statement or judgment, upon what ground the court held that there had been laches, it being an acknowledged principle upon which the court has invariably acted, that the defence of laches does not apply where the purchaser has continuously been in possession. The doctrine of laches is also inapplicable where the purchase money has been fully paid, for by an acceptance of the purchase money the vendor becomes a mere trustee of the land, and the case is governed by the Statute of Limitations. (*Crawford v. Birdsall*, 8 Grant, 415.)

An unanswered proposal for an arbitration and correspondence between the plain-

tiff and his solicitors held sufficient to account for delay in filing a bill to enforce a disputed agreement for a partnership. (*Haggart v. Allan*, 4 Grant, 36.)

See also as to laches in the case of a lessee with a right of purchase who had abandoned the possession, *Young v. Bown*, 6 Grant, 402.

In *Evans v. Evans*, 9 U. C. L. J. 71, reversing on appeal decree of the court below, it was held that where a father, the owner of 100 acres of land agreed in 1850, to convey to his son 50 acres, for the purpose of retaining him upon the land and settling him in life, and executed a bond for that purpose, and the son after obtaining this bond went away, paying nothing on account of purchase money, and ten years after filed a bill to enforce specific performance of the contract evidenced by the bond; no relief could be given to him on account of his great laches in omitting to do what he was bound to do in order to bring himself within the terms of his father's bond.

A party agreed to purchase for £200 a small piece of land, worth intrinsically not more than £7 10s., for the purpose of using it as a mill-pond, in order to protect himself against suits at the instance of the owner, but owing to a dispute as to the metes and bounds of the land, no deed was ever executed until after the purchaser's mill was destroyed by fire, when the vendor tendered the deed, but the vendee not then requiring the use of the land declined to complete the agreement. The court of appeal (reversing the decision of the court below, reported in 1 Grant, 394,) refused to enforce the contract, and dismissed the bill of the vendor filed for that purpose with costs. (*Blackwood v. Paul*, 4 Grant, 550.) *Robinson, C. J.*, said, "It is true that the mere circumstances of inadequacy of price in a purchase, will not, as a matter of course, induce the court to refuse specific performance. They do not set themselves scrupulously to consider whether the party applied against had what others would take to be a full consideration for an engagement which he deliberately entered into. But full effect may, I think, be allowed to all the cases which have affirmed that principle; and yet there would be found a weight of authorities against enforcing specific performance of this agreement which I think it would be difficult to overcome." The judgment proceeded chiefly on the ground of laches and waiver by the vendor.

Option to purchase.—In *Forbes v. Connolly*, 5 Grant, 657, the bill was filed to enforce a specific performance of the contract in the form of a covenant to convey, and failing that, then for a conveyance upon terms referred to, and which terms the plaintiff alleged were accepted by him. The evidence adduced was insufficient to sustain the latter portion of the relief asked. As to the other ground, *Spragge, V. C.*, said, "The defendant's right to resist a conveyance must rest then upon the plaintiff's default in the payment of the rent, and we think upon a covenant of this nature, when the covenantor cannot enforce a sale, but it is entirely in the option of the covenantee whether he will purchase or not, and where he is at liberty to exercise his option only upon the performance of certain specified terms, the contract rests upon a wholly different footing from an ordinary contract for the sale and purchase of land, and that a party entitled to purchase or not, at his option, must shew that he has performed all the terms, upon the performance of which alone he is entitled to exercise that option." The bill was dismissed with costs.

As to speculative purchase.—The court will not encourage speculative purchases, where, therefore, it was shewn that the purchaser had not the means of paying for the property contracted to be sold, and after several demands upon him to complete the purchase, the vendor sold to a third party with the knowledge of the original purchaser, who did not forbid the sale, and appeared to acquiesce in it, but afterwards, when by reason of the construction of a railroad, the land had increased very much in value, filed a bill to obtain a specific performance of his contract, the court dismissed his bill with costs. (*Langstaffe v. Mansfield*, 4 Grant, 607.)

Title.—Taking possession by the purchaser is not a waiver of the right to a reference as to title, but the purchaser is bound to pay his purchase money into court pending the enquiry before the master, (*O'Keefe v. Taylor*, 2 Grant, 305,) and so, where the bill was by the vendor, the purchaser was required to pay his purchase money into court pending the enquiry as to title, he having made unreasonable delay in payment, (*Crooks v. Glenn*, 8 Grant, 239, 242; following *O'Keefe v. Taylor*, *supra*.) and from the peculiar mode of dealing with landed estates in this country the court will not introduce the strict English rule, with respect to waiver of title, by the fact of possession. (*Morin v. Wilkinson*, 2 Grant, 157.) Where a purchaser filed his bill praying for a specific performance if a good title could be shewn, and if otherwise, that the bond might be delivered up to be cancelled, the vendor failing to shew a good title, the court decreed the other branch of the prayer. (*Ibid.*)

The court will not compel a purchaser to accept a title unless it is reasonably clear and marketable. (*Francis v. St Germain*, 6 Grant, 636.)

Where a purchaser had entered into possession and erected machinery and made several alterations in the property while in occupation, and where the expense of restoring the property to its original condition was considerable the court held that by these acts the purchaser had waived his right to call for a good title. (*Commercial Bank v. McConnell*, 7 Grant, 323.)

A clause in the conditions of sale that the vendors shall only produce certain title deeds and an abstract of the registrar, and that the purchaser shall not be entitled to call for any other proof of title does not exempt the vendors from showing otherwise a good title. (*The Canada Permanent Building Society v. Wallis*, 8 Grant, 368.) On a purchase of land, the price for which is payable by instalments, the purchaser may require a good title to be shewn before parting with any portion of his purchase money, and in the event of the vendor taking proceedings to enforce payment, the purchaser upon bringing into court the amount actually due will be entitled to an injunction to restrain the action until the title has been investigated; and the fact that the prior instalments of the purchase money have been paid is not a waiver as to title. (*Thompson v. Brunskill*, 7 Grant, 542; followed in *Gambles v. Gummerson*, 9 Grant, 193, 201.) These cases impugn the judgment in *Chantler v. Ince*, 7 Grant, 432, where *Blake, C.*, decided that as the vendor had only undertaken to convey the estate free from incumbrances at the end of three years, could not be compelled to discharge the incumbrances in the meantime. See particularly the remarks of *Esten, V. C.*, 9 Grant, 199. Where the owner of fifty acres of land, the title to one of which was defective, sold to a purchaser who had knowledge of the defect, and agreed to purchase the whole for a certain sum, the purchaser with others had at the same time an independent interest in the one acre, and obtained a decree ordering the vendor to convey it to him and the others, the vendor then filed a bill for specific performance of the entire contract; it was held that the purchaser must pay the whole of the purchase money on receiving a clear title to the forty-nine acres. (*Curran v. Little*, 8 Grant, 250.)

If the vendor cannot make out a title and the contract is therefore rescinded, the court has jurisdiction to decree the return of the deposit paid by the vendee. (*Hurd v. Robertson*, 7 Grant, 142: 5 U. C. L. J. 147-8;) and also of purchase money which has been paid *with interest*; (*Kilborn v. Workman*, 9 Grant, 255;) but the court will not allow a purchaser, who has been in possession, for improvements made by him under similar circumstances; (*Ibid.*) as to costs see *Healey v. Ward*, 8 Grant, 337.

Where a party agrees to convey property he is bound to do so free from dower or subject thereto, with an abatement of the purchase money. (*Kendrew v. Shewan*, 4 Grant, 578; 1 U. C. L. J. 66; *Van Norman v. Beaupre*, 5 Grant, 599.) In these cases the dower was inchoate, the husband being living.

Writing a letter apologising for non-payment of purchase money; accepting a release of dower from a person whose title is identical; or giving a mortgage to secure the payment of the purchase money, are circumstances indicating that the title of the vendor is approved of. (*McDonald v. Garrett*, 8 Grant, 290.)

Where a vendor sells only such title as he has, the purchaser cannot require a good title to be shewn, but will be required to complete the purchase though the title be not good. (*Leslie v. Preston*, 7 Grant, 434.)

Uncertainty.—As to uncertainty, see the judgment of *Len*, V. C., in *Hook v. McQueen*, 2 Grant, 504. In this case a portion of the subject of the contract was, "as much of lot 17 as should require to be flooded for the purpose of working a mill on lot 16," and *Esten*, V. C., acting on the maxim, *certum est quod certum reddi potest*, considered that neither a jury nor a master would be incompetent to ascertain the quantity of lot 17 necessary, and that consequently the contract was not void for uncertainty. The bill in this case was dismissed on the ground of laches, and therefore the point as to uncertainty was not decided. It is very questionable, however, whether a contract similar to the above is not on the authority of English cases void for uncertainty, see *Gervais v. Edwards*, 2 D. & War. 80; *Taylor v. Gilbertson*, 2 Drewry 891; *Tatham v. Platt*, 9 Hare, 660; *Holmes v. Eastern Counties R. Co.*, 3 Kay & J. 675; *Lord J. Stuart v. London & N. W. R. Co.*, 1 DeG. M. & G. 721, 785; reversing s. c., 15 Beav. 513; *Webb v. Direct London & Portsmouth Ry.*, 1 DeG. M. & G. 621, 630; reversing decision by V. C. *Turner*; *Lancaster v. Humphrey de Trafford*, 8 Jur. N. S. 873, in which case, *Romilly*, M. R., said, p. 874: "I cannot enforce the specific performance of a contract in which the subject matter is not ascertained, and not capable of being ascertained except by an arbitrary selection of certain limits." And see also as to uncertainty, *McLaughlin v. Whiteside*, 7 Gr. 576-7; *Cæsar v. Norton*, 8 U. C. Q. B. 587; *Cummings v. McLachlan*, 16 U. C. Q. B. 626; *Buchner v. Buchner*, 6 U. C. C. P. 314.

Mistake and misunderstanding as to contract.—As to mistake as a ground for refusing specific performance, see *Cottingham v. Boulton*, 6 Grant, 186, and also *Osborne v. The Farmers' & Co., Building Society*, *supra*, where there was a substantial misdescription of the property in the advertisement of sale, (the sale being by trustees under a power,) and a bill by the purchaser asking specific performance with an abatement in the purchase money to compensate for the misdescription, was dismissed, apparently on the grounds that the misdescription was different not merely in degree, but in kind, and that the misdescription (and consequent mismanagement of the sale) amounted to a breach of trust. As to misunderstanding, see *McLaughlin v. Whiteside*, 7 Grant, 578; and see *James v. Freeland*, 5 Grant, 302, where it was held that notwithstanding a misunderstanding by the vendee he was bound to complete the contract, and that too, although the vendors were aware of, and had not pointed out the circumstances out of which the misunderstanding arose at the time of the sale.

Fraud in contract.—Misrepresentations contained in the advertisement of sale, which are objects of sense, as respecting soil, trees, &c., are no grounds for rescinding contracts; the purchaser should examine for himself. (*Crooks v. Davis*, 6 Grant, 317.) Misrepresentation as to title whereby the purchaser was induced to give the full value of the land, held a ground for refusing specific performance, though the vendor only agreed to sell such title as he had, it appearing that the vendor could give no title at all. (*Leslie v. Preston*, 7 Grant, 439.) See also as to misleading, (*Devine v. Giffin*, 4 Grant, 603,) where specific performance was decreed, the defendants answer being contradicted as to the fact of misleading.

Specific performance will not be refused on the ground that arrangements were made at the sale whereby an intending purchaser might have been misled, if it do not appear that the purchaser was in fact misled. (*Crooks v. Davis*, *supra*.)

Specific performance was refused on the ground of exorbitant price and intoxication of purchaser when he signed the agreement. (*Schofield v. Tummonds*, 6 Grant 568.)

Where the owner of an estate stands by and allows a third person to appear as the owner, and enter into a contract as such, the owner will be decreed specifically to perform such contract. (*Davis v. Snyder*, 1 Grant, 134.)

Where a party purchased on representations which amounted to express guarantees, and which were untrue, the court at his instance rescinded the agreement, and the amount expended in repairs on the faith of those representations was ordered to be paid by the vendor. (*Gale v. Hubert*, 6 Grant, 312, 316.)

Abandonment.—As to abandonment see *Gray v. Springer*, 5 Grant, 242; reversed on appeal, 7 Grant, 276; and *McDonald v. Jarvis*, 5 Grant, 568.

Rescission.—The head note in *McDonald v. Garrett*, 7 Grant, 606, is thus stated. "That a purchaser cannot file a bill for a rescission of his contract, but must wait until the vendor attempts to enforce the agreement against him." This head note is not borne out by the judgment of *Spragge, V. C.*, in this case. This learned judge says, p. 611, "The plaintiff seeks as his main ground of relief the cancellation of the contract, and re-payment of moneys paid by him under it, *not alleging fraud or misrepresentation, or any cause of objection in its inception, nor even any fraudulent use made of it since*, but simply that from subsequent circumstances he ought not to be bound by it. He admits that he finds no precedent for such a bill. If such a bill would lie, it is tolerably certain that such bills would have been filed, because it would be a great advantage to a man to be able to ascertain by the judgment of a court, whether he is not released from a contract into which he has entered, *but it has always been supposed, I believe, that a man must wait until the contract is attempted to be enforced against him.*"

It is quite clear that these words in no way justify the head note. A purchaser may file his bill to rescind the contract in any case where it can be attacked for fraud, misrepresentation in its inception, or where any fraudulent use has been made of it since.

A notice given by the purchaser on the 2nd December, 1858, that unless a full and perfect abstract were delivered before the 24th of the same month he would hold the contract at an end, held no ground for contending for a rescission of the contract. (*Thompson v. Brunskill*, 7 Grant, 548.)

Where judgments are registered against the vendee of lands prior to the conveyances being executed in pursuance of the contract, the vendor is not entitled to a rescission of the contract in default of payment, but may obtain a decree of foreclosure or sale. (*Galt v. Bush*, 8 Grant, 360.)

Where a vendor recovered a judgment against his vendee for a portion of the purchase money, and then wrote a letter to him cancelling the agreement; it was held that having cancelled the contract he could not afterwards enforce his judgment. (*Cameron v. Bradbury*, 9 Grant, 67.)

Sale subject to incumbrances.—Upon a contract for the sale of an estate subject to a mortgage, it was stipulated that the vendor should execute a bond to save harmless, and indemnify the purchaser against the incumbrance: subsequently to the execution of the contract, the vendor being a partner in a mercantile firm, had made a composition with his creditors, and it was held that this was not such an objection as could resist the claim to specific performance. The court decreed specific performance, but on the condition that the vendor should apply the pur-

chase money in pursuance of an arrangement in payment *pro tanto* of the prior incumbrance. (*Fisken v. Wride*, 7 Grant, 598; 5 U. C. L. J. 232.)

A purchaser having paid all his purchase money, filed a bill under the covenant for further assurance to compel his vendors to pay of a mortgage disclosed at the time of sale. It was held, that the bill was properly filed although the purchase money had been paid, and there was no concealment of the incumbrance, and that under such a covenant the purchaser had a right to require the removal of incumbrances created by his vendor. (*Tripp v. Griffin*, 5 U. C. L. J. 117.)

Sale subject to a condition precedent.—A vendee covenanted to fence the land contracted for forthwith, and to build a house within a limited time, and the vendor agreed upon payment of the purchase money, and the due fulfilment of all the other covenants entered into by the vendee, to convey the premises in question. The vendee without either fencing in the land or building thereon, tendered the amount of his purchase money and interest and demanded his deed, which was refused, and he then filed his bill for specific performance, which the court dismissed with costs. (*Allan v. Bown*, 4 Grant, 439; 1 U. C. L. J. 66.) See also as to a condition precedent to a conveyance, *Jackson v. Jessup*, 5 Grant, 524.

Vendor's lien.—A vendor of real estate who takes by way of security for the purchase money the joint and several promissory notes of the vendee and surety does not lose his lien on the estate for the purchase money though he took no mortgage therefor. (*Colborne v. Thomas*, 4 Grant, 102.) In this case the English cases then decided are reviewed at length by *Blake, C.*, in his judgment, and the law upon the point as understood in this court was clearly stated, and has since been consistently followed, see *Foulds v. Powell*, 6 Grant, 375. So too where the owner of land agreed to sell the growing timber thereon, and by the terms of the agreement it was stipulated that the price should be paid by the purchaser's note, endorsed by a responsible party, renewable for half at its maturity, the delivering of such note within ten days from the date thereof to be the completion of the consideration for said agreement, it was held that this was only a mode of paying the purchase money, and was not substituted for it, and that the vendor had not lost his lien. *Blake, C.*, in his judgment said, "Upon this question I do not know that I can add any thing to what has been already said in *Colborne v. Thomas*, *supra*. The doctrines of equity in relation to the vendor's lien for unpaid purchase money, are founded, as appears to me, on the plainest principles of natural justice. What can be more unconscientious, more unjust, than the course pursued by the present defendant. His contention is that he is entitled to strip the plaintiff's land of all the timber still standing, and to carry off what has been already cut, although he has neglected, in direct violation of his contract, to pay a single shilling of the purchase money." (*Mitchell v. McGaffey*, 6 Grant, 361.) See also *Lawrence v. Judge*, 2 Grant, 301; *Ferrier v. Kerr*, 2 Grant, 668.

Where a sale was made and conveyance executed before a Court of Chancery was established in Upper Canada, it was held that a vendor had notwithstanding, a lien for unpaid purchase money, and such a lien was enforced against subsequent purchasers who, when they acquired their interest, had notice of the purchase money being unpaid. (*Davis v. Bender*, 4 Grant, 620.) See also *Baldwin v. Duignan*, 6 Grant, 595; *Hughson v. Davis*, 4 Grant, 588; *Burgess v. Howell*, 8 Grant, 37. Where land was conveyed in consideration of the vendee providing the vendor with maintenance, washing, &c., it was held that the vendor retained a lien for the consideration. (*Paine v. Chapman*, 6 Grant, 338.) The principles enunciated in *Colborne v. Thomas*, *supra*, were applied to this case.

A tract of land was bought by several parties with a view of laying off a portion thereof into building lots, and selling the same to purchasers; for greater facility, in

doing so, the legal estate was vested in one of them, as trustee, however, for the several parties interested. Subsequently one of the owners sold out his share, receiving in payment notes of hand made by his vendee, and endorsed by two other persons. It was held on appeal, reversing the decree of the Court of Chancery, (*Boulton v. Robinson*, 4 Grant, 109,) that the vendor did not under such circumstances retain any lien for the purchase money remaining unpaid. (*Boulton v. Gillespie*, 8 Grant, 228; 6 U. C. L. J. 197.)

The lien of a vendor for unpaid purchase money is not waived by the fact of his suing and recovering judgment for the amount, although such recovery is subsequent to another judgment registered against the purchaser. (*Flint v. Smith*, 8 Grant, 338.) See also *Maulson v. Moore*, 8 Grant, 448.

Generally.—As to whether an agreement under seal can be rescinded or varied by parol; (*McDonald v. Elder*, 1 Grant, 513;) as to letters constituting a complete and perfect contract. (*Arnold v. McLean*, 4 Grant, 337; reversed on appeal, 8 Grant, 242; *Dennison v. Kennedy*, 7 Grant, 342.) Where a vendor sued upon the covenants of a bond and obtained judgment, and then filed his bill setting out the agreement and praying foreclosure. It was held that the suit was improperly framed, but that he might amend on payment of costs. *Query*, was his action at law a waiver of his remedy by specific performance. *Esten*, V. C., was of opinion that there was no waiver, and that the plaintiff was not prejudiced thereby, for if he failed in one remedy, he might resort to the other. (*McAvoy v. Simpson*, 6 U. C. L. J. 94.)

As to the specific performance of a voluntary agreement, (which was refused,) see *Barr v. Hatch*, 9 Grant, 312.

Specific performance will be decreed against a tenant in tail at the instance of his co-tenant. (*Graham v. Graham*, 6 Grant, 372.)

See also as to specific performance, *Osborne v. Osborne*, 5 Grant, 619; *Gould v. Hamilton*, 5 Grant, 192; 1 U. C. L. J. 210; *Arnold v. Hull*, 7 Grant, 47; *Cotton v. Corby*, 7 Grant, 50; *Crooks v. Torrance*, 6 Grant, 518; affirmed on appeal, 8 Grant, 220; *Walker v. Provincial Insurance Company*, 5 U. C. L. J. 162; *Penley v. Beacon Insurance Company*, 5 U. C. L. J. 213; *Burns v. The Canada Company*, 7 Grant, 587; *Towers v. Christie*, 6 Grant, 159; *Merritt v. Tobin*, 1 U. C. Jur. 2, 257, 274; *Shaw v. Burrell*, 2 U. C. Jur. 20.

On the question of costs. (*Hutchison v. Rapelje*, 2 Grant, 333; *Currah v. Rapelje*, 2 Grant, 542.)

Chattels.—In *Fuller v. Richmond*, 2 Grant, 24; 4 Grant, 657, 669; 1 U. C. L. J. 57, the bill was filed for the specific performance of an agreement entered into between the plaintiff and one of the defendants, whereby the plaintiff had agreed to advance money for getting out saw-logs for him; he accordingly made advances; but notwithstanding, the defendants sought to interfere with his right to the saw-logs. The court treating the saw-logs as chattels of peculiar value, decreed specific performance. See also *Flint v. Corby*, 4 Grant, 45; and *Stevenson v. Clarke*, 4 Grant, 540; 1 U. C. L. J. 65, where a similar decree was made. *Esten*, V. C., in his judgment in this latter case, says, "We distinguish this suit from one for the specific delivery of chattels which rests upon property. The present suit is founded upon a contract of which the plaintiffs are entitled to the specific execution, the chattels forming the subject of it having been identified, and possessing a peculiar value." It would appear from the judgment in *Flint v. Corby*, that saw-logs cannot be intended *prima facie* to be of "peculiar value," without any evidence that they are so. But that they are more likely to be of peculiar value than most other descriptions of chattels, and specific relief would be given with respect to them in most instances, and in a much greater number of cases than almost any other sort of

chattel property. The relief must, however, be applied for promptly. These decisions were subsequently followed by the court in *Farwell v. Wallbridge*, 2 Grant, 832; 6 Grant, 684, the court in this case ordering the specific delivery of the saw-logs, because they were shewn to possess a peculiar value to the plaintiff, and were identified as those claimed by him, notwithstanding they were intermingled with logs belonging to other parties. The court will, however, not interfere to restrain the sale of chattels unless of "peculiar value." (*Geddes v. Morley*, 1 U. C. Jur. 2, 828.) As to delivery after insolvency of purchaser, see *Wait v. Scott*, 6 Grant, 164.

(o) DISCOVERY, &c.

For the principles as to the jurisdiction of equity under this head see 1 *Spence's Eq. Jur.* 676-680; *Fonblanque on Equity*, 15-22; *Story's Equity Jur.*, § 64k, *et seq.*; *Mitford on Pleading*, 64, *et seq.*

See Order IX. of the Orders of 1853, sec. 19, p. 53, *supra*. "No bill is to be filed for discovery merely, except in aid of the prosecution or defence of an action at law."

(p) MULTIPLICITY OF SUITS.

As to the preventing multiplicity of suits as a distinct ground of equitable jurisdiction, see *Mitford*, 169, *et seq.*, 211 *et seq.*; 1 *Story's Eq. Jur.*, § 64k, -66; *Fonblanque*, 15-22.

(q) STAY PROCEEDINGS AT LAW.

See *supra*, pp. 119-123.

Where a mortgage had been created by absolute deed, and a creditor of the mortgagee was about to sell the lands comprised in the deed under *fi. fa.*, he was restrained on a suit by the mortgagor, (*Neil v. The Bank of Upper Canada*, 2 Grant, 386,) in which suit it was also held that an injunction issued after the *fi. fa.* had been lodged in the hands of the sheriff would stay the execution. (*Ibid*, 388.) See further as to staying sale of lands and goods under writ of *fi. fa.*; (*Goodwin v. Williams*, 5 Grant, 178; *Grant v. McDonald*, 8 Grant, 468; *Vankoughnet v. Mills*, 8 U. C. L. J. 149; *Mellish v. Green*, 8 U. C. L. J. 149;) and see as to staying money in the sheriff's hands after execution, *Leonard v. Black*, 4 U. C. L. J. 260.

See as to restraining execution of a writ of possession in ejectment, *Cook v. Smith*, 4 Grant, 441, 1 U. C. L. J. 67; *Jackson v. Jessup*, 5 Grant, 524; *City of Toronto v. Municipal Council of York and Peel*, 6 Grant, 525.

The mere pendency of an equitable plea against the action at law, does not preclude the party pleading it from seeking relief in equity on the same ground; (*Pomeroy v. Boswell*, 7 Grant, 166;) where a judgment has been given in the action on such equitable plea, the court will not interfere or sit in judgment upon the decision of another court in respect of matters raised before it by way of such equitable plea. (*Boulton v. Cameron*, 9 Grant, 297; 9 U. C. L. J. 130.) If a party has chosen his tribunal of co-ordinate power, and failing there by reason of his omission, a court of equity will not assist him; if he have made a slip or his plea were otherwise incorrect, he should apply to amend, the discretion as to which is as wide at law as in equity. (*Ibid*.) From this case it seems clear that a party raising a defence to an action at law by way of equitable plea, should take care to set up all the grounds on which he intends to rely. See also *Morrison v. McLean*, 7 Grant, 167.

It is a contempt of a court of common law to proceed in equity after a reference to arbitration under an order of that court which orders the parties to perform the award, and equity will not enjoin proceedings in a suit where such a reference has been made, where the whole legal and equitable rights of the parties are in question in the action, and included in the reference. (*Pomeroy v. Boswell*, 7 Grant, 166-7.) See further as to staying proceedings at law, *Whittemore v. Ridout*, 2 Grant, 525; *Rees v. Beckett*, 2 Grant, 650; *Brewster v. The Canada Co.*, 4 Grant, 443; *Watt v. Foster*, 4 Grant, 543; *Tully v. Bradbury*, 8 Grant, 561.

The existence of the jurisdiction given to the courts of law as to the admission of equitable defences, does not however interfere with the power of a court of equity to restrain actions at law upon the grounds on which it formerly acted in such cases.

(r) TO DECREE THE ISSUE OF LETTERS PATENT FROM THE CROWN TO RIGHTFUL CLAIMANTS.

Registry acts do not apply to instruments executed previously to the grant from the Crown. (*Casey v. Jordon*, 5 Grant, 467.)

(s) TO REPEAL AND AVOID LETTERS PATENT, ISSUED ERRONEOUSLY OR BY MISTAKE, OR IMPROVIDENTLY OR THROUGH FRAUD.

By *Con. Stat. Canada*, ch. 22, sec. 25, p. 287, it is enacted as follows:—

"In all cases wherein patents for lands have issued through fraud, or in error, or improvidence, the Court of Chancery in Upper Canada, and the superior court in Lower Canada, may upon action, bill, or plaint respecting such lands, situate within their jurisdiction, and upon hearing of the parties interested, or upon default of the said parties after such notice of proceeding as the said courts shall respectively order, decree such patents to be void, and upon the registry of such decree in the office of the provincial registrars, such patents shall be void to all intents." This enactment is remarkable in its phraseology, which indicates anxiety on the part of the legislature to include every case that could possibly occur. First, it mentions all patents obtained by fraud, a large class of cases; second, all patents issued in error, which would seem to cover all other cases; for if a patent be improperly issued, it must be, it would seem, through fraud, or through mistake without fraud. But by this enactment, the legislature advances a step further, and includes all patents issued in "improvidence," that is, as the expression must be understood, patents issued not through fraud, nor in mistake, but hastily, incautiously, unadvisedly, to the injury of its own rights, or the rights of its subjects. This provision, however, introduced no new law. The Crown always had the power to repeal its letters patent issued under such circumstances.

The stat. 7 Wm. 4, ch. 2, sec. 2, enacted, "That the court should have jurisdiction to institute proceedings for the repeal of letters patent, erroneously or improvidently issued" This jurisdiction was extended by 4 & 5 Vic. ch. 100, sec. 29, which enacted that the court should have power "in all cases wherein patents for lands have or shall have issued through fraud or in error or mistake, to decree the same to be void;" and this jurisdiction is now settled by 16 Vic., ch. 159, sec. 21, *Consol. Stats. Canada*, ch. 22, sec. 25, above quoted. It will be observed on a comparison of sec. 25 of the *Consol. Stats. Canada*, ch. 22, with sec. 21 of 16 Vic., ch. 159, that the commissioners in consolidating this section have omitted the word "mistake;" it is necessary, therefore, to refer to the Chancery Act for jurisdiction in reference to this ground for repeal.

The Court of Chancery has jurisdiction under these statutes to rescind a patent

for land, though the grant may be voidable or even void *at law*. (*Martin v. Kennedy*, 2 Grant, 80.) The Crown having in ignorance of the facts disclosed in the statement of this case, subsequently to a former grant, patented the lands as a glebe, for the Rector of Darlington, such letters patent were rescinded as having been issued in error and mistake. (*Ibid.*, 4 Grant, 61.)

Where the provincial government had appropriated and patented as a glebe, a lot which had been previously occupied and improved, and upon which the patent fee had been paid by the occupier and not returned by the government, the patent was set aside as having issued in error and mistake. (*Attorney-General v. Hill*, 8 Grant, 582.)

Where it is presumed from circumstances that had the Crown Lands Department been aware of the real facts that a patent issued by it would not have been granted, the court has jurisdiction to repeal such patent on the ground of error, mistake, or inadvertence. (*Saugen v. The Church Society*, 6 Grant, 588.)

But it has no jurisdiction to set aside a grant of land made by the Crown upon a deliberate view of all the circumstances of a case, and in the absence of fraud or mistake: and *query*, even if there be fraud. (*Boulton v. Jeffery*, 1 Grant's E. & A. 111; 1 U. C. Jur. 2, 74; *Simpson v. Grant*, 5 Grant, 267; *Dougall v. Lang*, 5 Grant, 292, 5, 9.) The court may, however, in a proper case declare the patentee a trustee, and not permit him to hold a purchase made in breach of his duty for his own benefit, although the Crown, with full knowledge of the facts, has decided in his favour. (*Dougall v. Lang*, 5 Grant, 294.) Although the Crown will be permitted to shew mistake in law or fact, in respect of its grant, when it would not be open to an individual to do so, still the evidence must not be such as to make out a *prima facie* case only. (*Attorney-General v. Garbutt*, 5 Grant, 181, 388.)

It would seem that the constitution and jurisdiction of the heir and devisee commission does not oust the jurisdiction of this court either by express words or by necessary implication in regard to the repeal of letters patent, (*McDiarmid v. McDiarmid*, 9 Grant, 148, *et seq.*) where the question as to the jurisdiction of this court in such cases is discussed. The heir and devisee commissioners being absolved, by 8 Vic., ch. 8, from observing the strict letter of the law, a patent issued by the Crown, upon their recommendation, will not be set aside on the ground of error or improvidence from the mere fact that the grant is not according to the strict letter of the law, unless perhaps the recommendation be so unreasonable as to afford *per se* evidence of error and improvidence. (*Scane v. Hartrick*, 7 Grant, 161.)

The heir and devisee commission having reported that the heirs at law of A were entitled, and the Governor in Council having, notwithstanding such report, afterwards, on the report of the Solicitor-General, granted a patent to B, the court having found that there was no error in fact, held that the patent was properly issued, notwithstanding the finding of the commission. (*McDiarmid v. McDiarmid*, 9 Grant, 144.)

Patents issued to a purchaser upon a right of pre-emption obtained by fraudulent concealment are void. If a party knowing that another person claims to have an adverse right to pre-emption of Crown lands, or that there are circumstances which may give the other such right applies to the government to obtain these lands and does not state the circumstances giving rise to such adverse claim in his petition, or otherwise to the officers of the government, such suppression of the facts will in the eye of a court of equity be considered fraudulent, even if the circumstances were already known to the government, and if a patent be subsequently issued upon such application it will be declared void. (*Attorney General, (Jamieson relation,) v. McNulty*, 8 Grant, 324.) This case was followed in *Attorney-General, (Mc-*

Guire, relator,) v. McNulty, by *Eaten*, V. C., 25 April, 1853, not yet reported. See also *Proctor v. Grant*, 9 Grant, 26; reversed on re-hearing, 9 Grant, 224.

(c) GENERAL JURISDICTION.

By this enactment a similar jurisdiction is conferred on the court of this province as was possessed by the court in England on the 10th of June, 1857. The act 20 Vic., ch. 56, hereinbefore referred to, was assented to on that day. Though not very clear whether the court in England has jurisdiction in the case of policies of insurance, the court here held in *Penley v. The Beacon Assurance Company*, 7 Grant, 185; 5 U. C. L. J. 214; following the practice pursued in the United States, that it would be the safe course to assume jurisdiction in such cases until rectified by the court of appeal.

INJUNCTIONS.

Injunctions to stay waste, &c.

27. The court may grant an injunction to stay waste in a proper case, notwithstanding that the party in possession claims by an adverse legal title. 20 Vic., ch. 56, sec. 4. (u)

WILLS.

The court may try the validity of wills.

28. The court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect, real or personal estate, and to pronounce such wills and testaments to be void for fraud and undue influence, or otherwise, in the same manner and to the same extent as the court has jurisdiction to try the validity of deeds and other instruments. 12 Vic., ch. 64, sec. 10. (v)

(u) Previous to 20 Vic. ch 56; it would seem that the court could not grant an injunction to stay waste, where the party in possession claimed by an adverse legal title; this appears from *Attorney-General v. McLaughlin*, cited *infra*, which case is now avoided by force of that statute.

There are many cases in which a court of equity will interfere by injunction to maintain things in *status quo pendente lite*, not only where the title of the plaintiff to relief is unquestioned, but even where that title is doubtful, provided the court sees that there is a substantial question to be settled. But the court does not interfere by special injunction against a party in possession claiming adversely to the plaintiff, nor on the other hand will the court, as a general rule, so interfere in favour of a party in possession to restrain a casual trespass. (*Attorney-General v. McLaughlin*, 1 Grant, 84.)

(v) Prior to the passing of 12 Vic., ch. 64, the court had no jurisdiction to set aside a will for fraud; the courts of law having jurisdiction in case of a will of real estate, and the surrogate court having jurisdiction in the case of personal estate; (*Kenrick v. Bransley*, 3 Bro. P. C. 358; *Webb v. Cleverden*, 2 Atk. 424;) the section of that act here consolidated, however, gives this court concurrent jurisdiction in such cases.

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ALIMONY.

29. The court shall also have jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when decreed shall continue until the further order of the court. 7 Wm. IV., ch. 2, sec. 3; 20 Vic., ch. 56, sec. 2. (w)

(w) The Court of Chancery having since its first establishment exercised jurisdiction in cases of alimony, refused to question the right to exercise such jurisdiction in a clear case for relief. (*Soules v. Soules*, 2 Grant, 299.) The court will in a proper case grant interim alimony *pendente lite*. (*Soules v. Soules*, 3 Grant, 113.) Where in a suit for a separate maintenance interim alimony had not been applied for, the court refused to carry the allowance for alimony back to a date beyond the time of making the decree. (*Ibid.*, 3 Grant, 117.) Interim alimony is only allowed upon such a scale as to supply the reasonable necessities of the wife pending the suit. (*Ibid.*, 3 Grant, 117.) The court will refer it to the master to fix an amount to be paid to the plaintiff for alimony. (*English v. English*, 6 Grant, 580.) The conduct of the wife should weigh much in determining the amount, and this rule is a reasonable one; the court, however, has adopted the husband's income as the proper guide for fixing the sum to be paid, (*Severn v. Severn*, 7 Grant, 109,) and where that income had increased to such an extent as to justify an additional allowance, the allowance was increased from £25 to £200. (*Severn v. Severn*, *supra*.)

As to desertion coupled with cruelty as a ground for relief. (*Severn v. Severn*, 3 Grant, 431; *Jackson v. Jackson*, 8 Grant, 499.)

As a general rule, the next friend who institutes the suit is (whether the plaintiff be successful or not) entitled to costs as between *solicitor and client*, (*Soules v. Soules*, 3 Grant, 120, 1; *McKay v. McKay*, 6 Grant, 383,) and he is entitled to tax them *de die in diem*. Where the plaintiff in an alimony suit after an order for interim alimony had been made, returned to her husband's house and resided there for some time, but was afterwards obliged to leave by reason of cruelty; a motion to set aside the interim order on the ground of condonation, was refused with costs. (*Maxwell v. Maxwell*, Grant's Cham. R. 27.)

The defendant having signed a consent to an order being made directing him to pay the plaintiff a certain sum for alimony, a motion was made in chambers for an order in terms of the consent, it was held that as the order if made in the terms of the consent would amount in reality to a decree, the matter must be brought before the full court. (*Craig v. Craig*, Grant's Cham. R. 41.)

By Con. Stat. U. C., ch. 24, secs. 9 and 10, p. 278, it is provided:—

"9. In suits for alimony instituted after this act takes effect, the court or a judge

In suits for alimony a writ of arrest may be issued.

30. See post, chap. 24, respecting arrest and imprisonment for debt, &c., page 278, s. 9.

LUNATICS.

Cases of lunatics and their estates.

81. In the case of lunatics, idiots, and persons of unsound mind, and their property and estates, the jurisdiction of the court shall include that which in England is conferred upon the Lord Chancellor by a commission from the Crown, under the sign manual. 9 Vic., ch. 10, sec. 1.

The word "lunatic," extended.

82. The word "lunatic" is used in the subsequent sections of this act as including an idiot or other person of unsound mind. 9 Vic., ch. 10, sec. 1.

Commissions of lunacy may be dispensed with.

83. The court may, on sufficient evidence, declare a person a lunatic without the delay or expense of issuing a commission to enquire into the alleged lunacy, except in cases of reasonable doubt. 20 Vic., ch. 56, sec. 5.

84. When a commission has been issued and an inquisition thereupon returned into court, by which a person

thereof may in a proper case order a writ of arrest to issue at any time after the bill has been filed, and shall in the order fix the amount of bail to be given by the defendant in order to procure his discharge. 20 Vic., ch. 56, sec. 8.

"10. In case an order is made for a writ of arrest in a suit for alimony, the amount of the bail required shall not exceed what may be considered sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less, at the discretion of the court. 22 Vic., ch. 33, sec. 2. (1859.)"

The writ of arrest will be granted *ex parte* by a judge in chambers at any time after bill filed, on an affidavit verifying the bill, and shewing the amount of the defendant's property, and his intention to leave the province. The sum mentioned in the writ is in proportion to the defendant's means. (*Harn v. Harn*, 4 U. C. L. J. 261.) It was endorsed for £200 in this case, the defendant having £225 in stock, and a salary of £100 per annum. In *McDonald v. McDonald*, *infra*, the sum mentioned for bail was £1000.

The writ of arrest granted after filing a bill in an alimony suit remains in force after decree; and it is no objection that the wife resides out of the jurisdiction, as during coverture the domicile of the husband is the domicile of the wife. (*McDonald v. McDonald*, 5 U. C. L. J. 60.) It was also decided in the same case reported in *Grant's Cham. R.* 22, that the bail of a defendant who has been arrested upon a writ of arrest cannot be discharged from their bonds upon the defendant rendering himself to the custody of the sheriff.

is found lunatic, in case any one entitled to traverse the inquisition desires to do so, he may within three months from the day of the return and filing of the inquisition, present a petition for that purpose to the court, and the court shall hear and determine the petition, subject to the following provisions: 9 Vic., ch. 10, sec. 2.

Traverse of inquisition of lunacy.

1. In every order giving effect to such petition, the court shall limit a time not exceeding six months from the date of the order, within which the person desiring to traverse, and all other proper parties, shall proceed to the trial of the traverse; but the court may under the special circumstances of any case, and upon a petition being presented for that purpose, and upon the circumstances being substantiated upon affidavit, allow the traverse to be had or tried after the time limited; and in such special case, the court may make such orders as seem just; 9 Vic., ch. 10, sec. 3.

Time to be limited.

2. The trial may be ordered to take place in any court of record in Upper Canada, or before a judge of the Court of Chancery with the aid of a jury, according to the circumstances of the case and the situation of the parties; 9 Vic., ch. 10, sec. 3; 20 Vic., ch. 56, sec. 13.

May be tried in any court of record or before one of the Chancery judges.

3. The court may order that the person to traverse, if he is not the party who has been found lunatic, shall, within one month after the date of the order, file with the registrar of the court a bond, with one or more sureties, in favour of the registrar for the time being, and conditioned for all proper parties proceeding to the trial of the traverse within the time limited; such bond before the filing thereof being approved of and certified to be sufficient by the judge of the county court of the county in which the parties reside, or by one of the judges or masters of the Court of Chancery;

What security the traverser shall give.

4. Every person who does not present his petition, or who neglects to give the security, or who does not proceed to the trial of the traverse, within the times respec-

When the traverser barred.

tively limited therefor, and the heirs, executors and administrators of every such person, and all others claiming through him, shall be absolutely barred of the right of traverse. 9 Vic., ch. 10, sec. 3.

Proceedings in
lieu of traverse
when no commis-
sion has issued.

35. In case the court declares a person a lunatic without issuing a commission, any person who might traverse an inquisition to the same effect, may move against the order containing the declaration, or may appeal therefrom, as the case requires; and the right so to move or appeal shall as to time be subject to the same rules as the right to traverse. 20 Vic., ch. 56, sec. 5.

New trials may
be granted.

36. In case the court be dissatisfied with the verdict returned upon a traverse, the court may order a new trial, or more than one new trial as in other cases. 9 Vic., ch. 10, sec. 4.

Property of luna-
tics.

37. In order to afford due protection to the property of lunatics, the following provisions shall in every case be observed. 9 Vic., ch. 10, sec. 5.

Security to be
given by the
committee.

1. The committee of the estate shall give two or more responsible persons as sureties, in double the amount of the personal estate, and of the annual rents and profits of the real estate, for duly accounting for the same once in every year, or oftener if required by the court; and the security shall be taken by bond or recognizance in the name of the registrar of the court for the time being, in such manner as the court or a master thereof may direct, and the same shall be filed in the office of the registrar.

The committee
to file an inven-
tory of present
property.

2. The committee of the estate shall, within six months after being appointed, file in the office of the registrar a true inventory of the whole real and personal estate of the lunatic, stating the income and profits thereof, and setting forth the debts, credits and effects of the lunatic, so far as the same have come to the knowledge of the committee;

3. If any property belonging to the estate be dis-

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covered after the filing of an inventory, the committee shall file a true account of the same from time to time, as the same is discovered; and

Also, of after discovered property.

4. Every inventory shall be verified by the oath of the committee. 9 Vic., ch. 10, sec. 6.

To be verified on oath.

38. Whenever the personal estate of a lunatic is not sufficient for the discharge of his debts, the following steps may be taken; 9 Vic., ch. 10, sec. 7:

When estate not sufficient to pay debts.

1. The committee of his estate shall petition for authority to mortgage, lease or sell so much of the real estate as may be necessary for the payment of such debts;

Committee to apply for leave to mortgage or sell, &c.

2. Such petition shall set forth the particulars and amount of the estate real and personal of the lunatic, the application made of any personal estate, and an account of the debts and demands against the estate;

What the petition is to contain.

3. The court shall, by one of the masters, or otherwise, enquire into the truth of the representations made in the petition, and hear all parties interested in the real estate;

The truth of to be enquired into.

4. If it appears to the court that the personal estate is not sufficient for the payment of debts, and that the same has been applied to that purpose as far as the circumstances of the case render proper, the court may order the real estate or a sufficient portion of it to be mortgaged, leased or sold either by the committee or otherwise;

If personal estate insufficient, real estate may be disposed of.

5. The court shall direct the committee to discharge such debts, out of the money so raised, and the court may order the committee to execute conveyances of the estate, and to give security for the due application of the money, and to do such other acts as may be necessary in such manner as the court may direct; and

Debts to be paid out of the proceeds.

6. In the application of any moneys so raised, the debts shall be paid in equal proportion without giving any preference to those which are secured by sealed instruments.

Ratably and without preference.

If effects not sufficient to maintain the lunatic, his real estate may be applied.

39. When the personal estate, and the rents, profits and income of the real estate of the lunatic are insufficient for his maintenance or that of his family, or for the education of his children, an application may be made by the committee, or by any member of the family of the lunatic, that the committee be authorised or directed to mortgage or sell the whole or part of the real estate, as may be necessary; upon which the like reference and proceedings shall be had, and a like order made, as for the payment of debts. 9 Vic., ch. 10, sec. 8.

Surplus sums how to be applied or disposed of.

40. In case of any mortgage, lease or sale being made, the lunatic and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have the like interest in the surplus which remains of the money raised as he or they would have in the estate, if no mortgage, lease or sale had been made; and such money shall be of the same nature and character as the estate mortgaged, leased or sold; and the court may make such orders, as are necessary for the due application of the surplus. 9 Vic., ch. 10, sec. 9.

When a lunatic is a trustee or mortgagee his committee may act, and how far.

41. When a lunatic is seised or possessed of real estate, by way of mortgage, or as a trustee for others in any manner, the committee may apply to the court for authority to convey such real estate to the person entitled thereto, in such manner as the court may direct; and thereupon the like proceedings shall be had as in the case of an application to sell the real estate; and the court upon hearing all the parties interested may order a conveyance to be made; and on the application, by bill or petition, of any person entitled to a conveyance, the committee may be compelled by the court, after hearing all parties interested, to execute the conveyance. 9 Vic., ch. 10, sec. 10.

Instruments executed by the committee to be valid.

42. Every conveyance, mortgage, lease and assurance made by the committee under direction of the court, pursuant to any of the provisions of this act, shall be as

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valid as if executed by the lunatic when of sound mind.

9 Vic., ch. 10, sec. 11.

43. The court may compel the specific performance of any contract made by a lunatic while capable of contracting, and may direct the committee to execute all necessary conveyances for the purpose; and the purchase money, or so much thereof as remains unpaid, shall be paid to the committee or otherwise as the court directs.

Specific performance, how compelled in such cases.

9 Vic., ch. 10, sec. 12.

44. The court may order any expenses and costs of and relating to the said petitions, orders, directions and conveyances to be paid and raised from the lands, rents or personal estate of the lunatic, in respect of which the same were respectively made, in such manner as the court thinks proper.

Costs and expenses, how to be defrayed.

PARTITION.

45. I regard to the partition and sale of estates of joint tenants, tenants in common and coparceners, the court shall possess the same jurisdiction as by the laws of England on the tenth of August, one thousand eight hundred and fifty, was possessed by the Court of Chancery in England, and also as by the laws of Upper Canada is possessed by the Courts of Queen's Bench and Common Pleas or by the County Courts. 13 & 14 Vic., ch. 50, sec. 4.

Partition and sale of joint estates.

(x) Committees of the persons and estates of lunatics, idiots, and persons of unsound mind, are to be appointed in the same manner, as nearly as circumstances will permit, as receivers are appointed by the court. See Order XXXVIII. of the Orders of 1853, and notes p. 175, *supra*.

The judge in chambers granted an application for a commission *de lunatico inquirendo*; the Orders of June, 1853, giving to a judge in chambers authority to act in such a matter. (*Re Stuart*, 4 Grant, 44.)

Where the estate of a person who has been found to be a lunatic is of small amount, the court will combine in one reference to the master all the usual enquiries, although the several objects are in England the subjects of distinct and separate references. (*Re Duggan*, 2 Grant, 622.)

Effect of decree
for.

46. In such cases, any decree, order or report by which a partition or sale is declared or effected, or any deed executed by the master of the court, to give effect to such partition or sale, shall have the same effect at law and in equity as the record of a return in the Court of Queen's Bench or Common Pleas or in the County Court has in matters of partition, or as sheriff's deeds now have in other cases. 13 & 14 Vic., ch. 50, sec. 4.

Estates of married women, &c., to be bound.

47. Any partition or sale made by the court shall be as effectual for the apportioning or conveying away of the estate or interest of any married woman, infant or lunatic, party to the proceedings by which the sale or partition is made or declared, as of any person competent to act for himself. 13 & 14 Vic., ch. 50, sec. 6.

Office copy of decree, &c., to be evidence.

48. An office copy of the decree, order or report declaring a partition, shall be sufficient evidence in all courts of the partition declared thereby, and of the several holdings by the parties of the shares thereby allotted to them. 13 & 14 Vic., ch. 50, sec. 4. (y)

(y) See 20 Vic., ch. LXV., sec. 15, Con. Stats. U. C., ch. LXXXVI., p. 861. By this enactment it is provided that any joint tenant, tenant in common or coparcener, or the agent of any person or guardian of any minor may file a petition in any of the superior courts of law or equity, or in the county court, according to the position of the lands praying for a partition or sale. This proceeding may be by bill, which in reality is a petition. (Bennett v. Bennett, 8 Grant, 446.) The application may, however, be made by petition without bill or suit as provided by Con. Stats., U. C., ch. LXXXVI. *Esten, V. C.*, said, *In re Foster*, Grant's Cham. R. 103; 8 U. C. L. J. 189; "The court will use its own machinery for carrying the purposes of this act into effect, so far as possible consistently with the express directions of the act, of which the provisions are somewhat singular, and do not appear to have been necessary, or to have effected any improvement in the practice as far as courts of equity are concerned." The learned judge also decided in the last cited case, that under the authority of the act last referred to, partition when ordered was to be made by the "real representative." That the question whether partition or sale should be ordered was proper to be referred to the "real representative," who was to make sale if ordered, but that the court might order a sale in the first instance if it saw fit.

Where on the hearing of a regular cause for partition of land, (not an application under the last mentioned act,) it was shewn that the estate was of such a nature that it could not be divided without prejudice to the owners, the court, without waiting for any return to that effect from the "real representative," ordered the lands to be sold by the master in the usual manner. (Bennett v. Bennett, 8 Grant, 447.)

INFANTS.

49. The court shall also have jurisdiction respecting ^{The custody of infants.} the custody of infants in the cases and subject to the provisions mentioned in the statute relating to the custody of infants. 18 Vic., ch. 126. (z)

50. When an infant is seised or possessed of or entitled to any real estate in fee, or for a term of years, or otherwise howsoever, in Upper Canada, and the court is of opinion that a sale, lease, or other disposition of the same or of any part thereof, is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such disposition, the court may order the sale, or the letting for a term of years, or other disposition of such real estate or any part thereof, to be made under the direction of the court or one of its officers, or by the guardian of the infant, or by any person appointed by the court for the purpose, in such manner and with such restrictions as to the court may seem expedient, and may order the infant to convey the estate as the court thinks proper. 12 Vic., ch. 72, secs. 1, 2; 13 & 14 Vic., ch. 50, sec. 8. (a)

See as to carrying out a decree for partition which omitted to direct the execution of conveyances. (O'Lone v. O'Lone, 2 Grant, 642.)

(z) The act respecting the appointment of guardians and the custody of infants is Con. Stats. U. C., ch. LXXIV. secs. 8, 9, 10, 11., for which and notes thereon see *infra*.

The Court of Chancery will upon the petition of the guardian duly appointed by the court of probate or surrogate, interfere summarily, and order the person of the infant to be delivered into the custody of such guardian, when there is danger of the infant being removed out of the jurisdiction, although no suit is pending in court respecting the infant's estate. (*Re Gillrie*, 3 Grant, 279.) Although the court is in the habit of paying respect to the wishes and directions of a testator in reference to the guardianship and care of his children, it will not do so when it is clearly shewn that a compliance therewith would be prejudicial to the happiness and moral training of the infants. (Anon., 6 Grant, 632.)

(a) See Order XXXVII. of the Orders of 1853, p. 166, *et seq. supra*. This Order

No sale contrary
to a devise.

51. But no sale, lease, or other disposition shall be made against the provisions of any will or conveyance by which the estate has been devised or granted to the infant or for his use. 12 Vic., ch. 72, sec. 2.

The application
to be by next
friend or guar-
dian.

52. The application shall be in the name of the infant by his next friend, or by his guardian; but shall not be made without the consent of the infant if he is of the age of seven years or upwards. 12 Vic., ch. 72, sec. 1. (b)

When a substi-
tute for an in-
fant may be ap-
pointed.

53. Where the court deems it convenient that a conveyance should be executed by some person in the place of the infant, the court may direct some other person in the place of the infant to convey the estate. 12 Vic., ch. 72, sec. 3.

provides for the mode of proceeding under this act. *In re Boddy*, 4 Grant, 144; a petition was presented in this case under this section, praying for the sale of the real estate, descended to the infant and for the appointment of the mother as guardian. But the court refused to direct a sale of the real estate of an infant merely because the ancestor was indebted, and held that it must be shewn that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit.

In re Kennedy, Grant's Cham. R. 97; 8 U. C. L. J. 188, it was held that in applying for a sale of real estate settled upon infants, the mother by whom the application was made, should join in the conveyance for the purpose of surrendering the life interest vested in her under the settlement.

In directing the sale of infants' real estates, the court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit. The court will order a sale of a portion of an infant's estate to save the rest when it is made to appear to be for the benefit of the infant. (*In re McDonald*, Grant's Cham. R. 97; 8 U. C. L. J. 188.)

Where a contract for the sale of infant's estate had been approved of by the court, it was held unnecessary for the purpose of obtaining a decree for specific performance either to allege or prove that the sale was a proper one under this section. (*McDonald v. Garrett*, 8 Grant, 290.)

(b) Order XXXVII., sec. 2, provides that "The petition is to be presented by the guardian of the infant, or by a person applying by the same petition to be appointed guardian, as hereinafter provided," and sec. 6 of the same Order provides that, "When the infant is above the age of seven years he is to be examined apart upon the matter of the petition, and his consent thereto, by the judge or master, as the case may be; and his examination is to be stated to have been taken under these orders, and is to be annexed to and filed with the petition. Where the infant is under the age of seven years, the fact is to be certified by the judge or master before whom he has been produced." For the form of petition see p. 392, *et seq. supra*.

54. Every such conveyance whether executed by the infant or some person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time. 12 Vic., ch. 72, sec. 3.

Deeds executed in behalf of, to be valid.

55. The moneys arising from any such sale, lease, or other disposition, shall be laid out, applied and disposed of in such manner as the court directs. 12 Vic., ch. 72, sec. 4.

The court to direct the application of the proceeds.

56. On any sale or other disposition so made, the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of, and the heirs, next of kin, or other representatives of the infant, shall have the like interest in any surplus which may remain of the money at the decease of the infant, as they would have had in the estate sold or disposed of if no sale or other disposition had been made thereof. 12 Vic., ch. 72, sec. 5.

The quality of surplus moneys upon sale of real estate.

57. If any real estate of an infant is subject to dower, and the person entitled to dower consents in writing to accept in lieu of dower any gross sum which the court thinks reasonable, or the permanent investment of a reasonable sum in such manner that the interest thereof be made payable to the person entitled to dower during her life, the court may direct the payment of such sum in gross or the investment of such other sum out of the proceeds of the sale of the real estate of the infant. 12 Vic., ch. 72, sec. 6.

In cases of dower a composition may be made.

SPECIAL PROVISIONS RESPECTING MORTGAGES.

58. Whereas the law of England was at an early period introduced into Upper Canada, and continued to be the rule of decision in all matters of controversy relative to property and civil rights, while at the same time, from the want of an equitable jurisdiction, until the fourth day of March, one thousand eight hundred and thirty-

Special provisions in cases of mortgages for-
feited before the
4th March, 1837.

seven, it was not in the power of mortgagees to foreclose, and mortgagors out of possession were unable to avail themselves of their equity of redemption, and in consequence of the want of these remedies the rights of the respective parties, or of their heirs, executors, administrators or assigns, may be attended with peculiar equitable considerations, as well in regard to compensation for improvements, as in respect to the right to redeem, depending on the circumstances of each case, and a strict application of the rules established in England might be attended with injustice; the court shall have authority in every case of mortgage, where, before the said fourth day of March, one thousand eight hundred and thirty-seven, the estate had become absolute in law, by failure in performing the condition, to make such decree in respect to foreclosure or redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators or assigns, as may appear to the court just and reasonable under all the circumstances of the case, subject, however, to appeal by either party. 7 Wm. IV., ch. 2, sec. 11. (c)

(c) See *McLellan v. Maitland*, 1 Grant, 268; 3 Grant, 164. In 1821 the plaintiff mortgaged three properties in Belleville, Kingston, and Camden, respectively, to secure a debt payable in the following year; it was not then paid. Payment was urgently demanded, and the mortgagees being in great pecuniary difficulties sold and conveyed with absolute covenants for title the property in Belleville for what appeared to be about its value at the time, and they gave credit for the amount on the mortgage; this property afterwards passed through several hands, and was bought by the present owner in 1837, who subsequently made considerable improvements on it and dealt with it as absolute owner; it was held that this property was not redeemable by the mortgagor on a bill filed in 1840, and that the effect of the sale and transfer by the mortgagees of portions of the mortgaged property was to transfer to the purchasers a part of the mortgage debt proportioned to the value of the property transferred as compared with the value of the whole property mortgaged. See also *Clute v. Macaulay*, 4 Grant, 410; *Smyth v. Simpson*, 1 Grant, E. & A. pp. 9-172; 5 Grant, 104; 2 U. C. Jur. 129; App. 1; 7 Moore, P. C. 205; which decides that the Court of Chancery may under this section, (which was the 11th section of 7 Wm. IV., ch. 2, "The Chancery Act,") under certain circumstances refuse redemption, notwithstanding twenty years have not elapsed

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DORMANT EQUITIES.

59. Whereas by the act to establish the Court of Chancery in Upper Canada, it was provided that the rules of decision in the said court should be the same as governed the Court of Chancery in England; and whereas in regard to claims upon, or interests in real estate arising before the said date, it is just to restrict the future application of the said rules of decision to cases of fraud, and in regard to other cases, it is expedient to extend thereto, in manner hereinafter provided, the authority so given to the court as aforesaid in case of mortgages: therefore, no title to or interest in real estate which is valid at law, shall be disturbed or otherwise affected in equity by reason of any matter or upon any ground which arose before the fourth day of March, A. D. one thousand eight hundred and thirty-seven, or for the purpose of giving effect to any equitable claim, interest or estate, which arose before the said date, unless there has been actual and positive fraud in the party whose title is sought to be disturbed or affected. 18 Vic., ch. 124, sec. 1.

Provisions respecting equities of long standing in relation to real estate.

60. In regard to any other equitable claim or right which may have arisen before said date, the court shall have authority (subject to appeal) to make such decree as may appear to the court just and reasonable, under all the circumstances of the particular case, provided that the suit be brought within twenty years from the time when the right or claim arose; and no further time shall be allowed for bringing any such suit, notwithstanding any disability of the claimant or of any one through whom his right accrued. 18 Vic., ch. 124, sec. 2. (d)

And in regard to other equitable claims.

since the mortgagor went out of possession. (*Arkell v. Wilson*, 5 Grant, 470; affirmed on appeal, 7 Grant, 270; *Walton v. Bernard*, 2 Grant, 344, 348; *Hall v. Coldwell*, 8 U. C. L. J. 93.)

(d) In *Silecox v. Sells*, 6 Grant, 287; 4 U. C. L. J. 17; it was held that this act relating to dormant equities, applied only to cases where the cause of suit arose

before the passing of the Chancery act, (4th March, 1837.) In this case it appeared that the locatee of lands of the Crown contracted to sell a portion thereof, the consideration for which was paid, but he continued to hold possession of the lands until the year 1855, when the heirs of the bargainee filed a bill to enforce specific performance of the contract, the patent from the Crown having been issued in 1830. The court dismissed the bill with costs. *Spragge, V. C.*, said, "The act seems to apply to real estate only, which it divides into two classes, the one where there has been actual and positive fraud, the other where there has not. It applies only to cases where the cause of suit arose before the passing of the Chancery act. The first section (59) applies to cases of actual fraud, and provides that no suit shall be brought for cases arising before 1837, unless there has been actual fraud. The second clause (section 60,) where there has been no actual fraud, and enables the court to deal with them, as they may deem reasonable and just, if the suit is brought within twenty years, and the suit must be brought within twenty years notwithstanding disabilities."

In *Attorney-General v. Grasett*, 6 Grant, 485, it was held that express trusts are not within the statute relating to dormant equities. In *Wragg v. Beckitt*, on appeal from the Court of Chancery, 7 Grant, 220; 5 U. C. L. J. 181, 209; (reported in court below *Beckitt v. Wragg*, 6 Grant, 454;) although it was not material to the decision of the case, which was very far from being an express trust between the parties, nevertheless the court gave a very strong opinion, and would have so held, had it been necessary, that the language of this act embraced express as well as implied trusts. After this case was decided, the Court of Chancery, in *Caldwell v. Hall*, 6 U. C. L. J. 141, again held, first, that this statute does not apply to cases of an express trust, and second, that clearly it does not extend to cases of mortgage, these cases being amply provided for by the Chancery Act. In remarking upon *Wragg v. Beckitt*, in appeal, *supra*, *Esten, V. C.*, said, "So far as it is a decision, I am bound to follow it; the extra judicial opinions expressed in it are entitled to full respect, but they are of course not binding." After reviewing the judgment in the case of *Wragg v. Beckitt*, the learned V. C. observed that he was at liberty to adhere to the opinion that he had always entertained, that the act does not extend to the cases of express trusts, and that in any event he should not consider that it extended to cases of mortgage. This case was carried to the Court of Appeal, and is reported 7 U. C. L. J. 42, and the decree of the court below was affirmed, without deciding whether the statute applied to express trusts, but holding that the act does not apply to cases of mortgage.

This section does not apply to cases of actual mortgage, that is where the proviso for redemption appears on the face of the instrument creating the incumbrance; such cases are to be dealt with under section 11 of the original Chancery Act. (*Hall v. Coldwell*, 8 U. C. L. J. 98.)

The case of *Attorney-General v. Grasett* was affirmed on appeal, 8 Grant, 180, and it was *queried* whether this act applied to every case of express trust, or whether a case of express trust so direct and plain might not arise that the court would feel authorised to hold that the statute did not extend to it, though no exception of express trusts is contained in the act.

In *Tiffany v. Thompson*, 9 Grant, 244, 249, *Vankoughnet, C.*, said, "In my own opinion the Dormant Equities Act does not apply to a case of express trust, for breach of which the *cestuis que trustent* seek redress against the trustee; and in the case of such a trust as the present, in respect to which the trustee is called to account, it can form no defence to him. I think the rule of construction should be, that the act does not apply as between trustees and *cestuis que trustent*, to the cases of such trusts, but that exceptional cases arising upon such trusts may find protection under it. I agree with what has been so well said by the late Chancellor, and

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my brother *Spragge*, in *Wragg v. Beckitt*, (*supra*.) upon the question, which I do not understand to be settled by any judgment of the Court of Appeal."

In *Arner v. McKenna*, 9 Grant, 226, it appeared that in 1834 a contract was made for the purchase of the easterly 50 acres of a lot of land, but through mistake the deed covered the whole north half, thus conveying the legal title to the north easterly and north westerly quarters, but the purchaser went into possession of the portion actually intended to be conveyed, and shortly after the vendee of the westerly portion went into possession of and occupied it, without any disturbance of his title or assertion of right by the party to whom the conveyance had been made by mistake, (although all parties knew of the error that had occurred,) until 1857, when the assignee of the person holding the legal title instituted proceedings in ejectment and recovered judgment, the evidence of adverse possession not being sufficient to outweigh the legal effect of the deed which had been so erroneously executed. The defendant raised, amongst other defences, the Dormant Equity Act, relying on *Wragg v. Beckitt*, and *Attorney-General v. Grasett*, *supra*, it was contended that the equity in this case was never dormant, but actively asserted from the time of its acquisition, the only title which had lain dormant was the legal one which had been acquired by the defendant. That in reality, the case was one of actual fraud, so that if even the plaintiff's equity could be treated as dormant, the act would not bar him, cases of fraud being excepted from it, and the court held that it was an actual fraud within the meaning of the exception for the grantor under the circumstances to assert his legal title, and that the equity of the plaintiff in this case did not fall within the designation of a dormant equity; the only dormant title being that which the defendant acquired, who was a constructive trustee for the plaintiff, acquiescing in the equity of his *cestui que trust*.

APPEALS.

61. The court shall have jurisdiction to entertain appeals by either party against any order or decree made by the judge of a county court under the equitable jurisdiction thereof, and the Court of Chancery shall make such order thereupon in respect to costs or otherwise, or for referring back the matter to the judge before whom the same was first heard, as may be just and proper. 16 Vic., ch. 119, sec. 18.

Appeal from decree, &c., of county courts.

62. The court shall also have jurisdiction on any appeal from the judgment or decision of the commissioners under the act for the protection of the lands of the Crown in Upper Canada, except as in the said act is otherwise provided; and the court may alter, affirm or annul, the decision of the commissioners, or order further enquiry to be made, or direct an issue touching the matter in dispute, to be tried at law or before the court or a judge thereof with the assistance of a jury, and may

Appeals from decisions of certain commissioners for protection of Crown lands.

make such orders and directions therein for payment of costs, and other matters respecting the same, as to the court seem just; and the decree of the court shall be conclusive on the party appealing, as well as on the commissioners. 2 Vic., ch. 15, sec. 11. (e)

VESTING ORDERS.

Vesting order,
effect of.

63. In every case in which the court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the court may make an order or a decree vesting such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order or decree shall have the same effect both at law and in equity as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last mentioned person. 20 Vic., ch. 56, sec. 8. (f)

REGISTRATION.

64. The filing of a bill or the taking of a proceeding,

(e) See Orders County Court, Equity Side, Order XLIV., secs. 1 to 7.

(f) In *Slater v. Fiskin*, Grant's Cham. R. 1; 4 U. C. L. J. 261; a motion was made under this section on behalf of the defendants for an order vesting the property sold in the purchaser. It appeared that a sale had been made of lands, the title to which was vested in a married woman and infants, and the defendants who had the conduct of the sale were unable to ascertain the residence of the parties whose estate had been sold. The application was opposed on the ground that it had not been shewn that at the time of the sale the persons whose interests had been sold were living. *Esten, V. C.*, refused the application, as the purchaser had a clear right to require proof that the persons whose estates were sold were in existence at the time of the sale, and expressed a doubt if, under any circumstances, the court would force a purchaser to accept a title under a vesting order instead of by a conveyance, the purchaser's right being to insist upon covenants from the grantors.

For a form of vesting order see *supra*, p. 385.

in which bill or proceeding any title or interest in land is brought in question, shall not be deemed notice of the bill or proceeding to any person not being a party thereto, until a certificate by the registrar or a deputy-registrar of the court, in the form mentioned in this section, has been registered in the registry office of the county in which the land is situate:

A bill filed, &c., not notice unless certificate be registered in the court registrar's office.

"I certify that in a suit or proceeding in Chancery between A. B. and C. D., some title or interest is called in question in the following land, (*describing it.*)"

Form of certificate.

But no certificate is required to be registered of a suit or proceeding for the foreclosure of a registered mortgage. 18 Vic., ch. 127, sec. 3; 20 Vic., ch. 56, sec. 9.

Not necessary in foreclosure cases.

65. Every decree affecting land may be registered in the registry office of the county where the land is situate, on a certificate by the registrar or a deputy-registrar of the court, setting forth the substance and effect of the decree, and the land affected thereby. 18 Vic., ch. 127, sec. 4.

Decree affecting lands may be registered.

66. [This section is repealed by 24 Vic., ch. XLI., sec. 1.]

What other decree may be registered, and bind lands.

67. [This section is repealed by 24 Vic., ch. XLI., sec. 1.]

When the court may release part of an estate from the lien created by registration.

68. [This section is repealed by 24 Vic., ch. XLI., sec. 1.] (g)

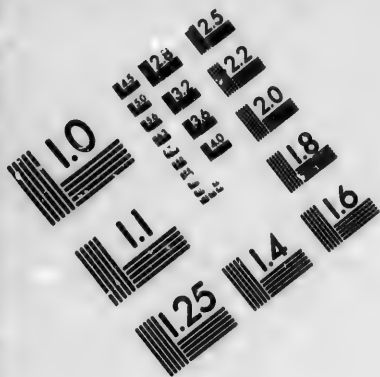
The court may order sale of the real estate.

ISSUES.

69. In any case in which the court requires an issue to be tried by a jury, it shall not be necessary to com-

(g) See p. 77, *supra*. An order is not necessary to discharge a certificate *lis pendens*, the registration of the decree dismissing the bill is sufficient. (Dexter v. Cosford, 5 U. C. L. J. 67.) Under section 65, it is provided that a decree affecting lands may be registered on a certificate of a registrar or deputy-registrar of the court, but by section 40 of Con. Stats. U. C., ch. LXXXIX., (The Registry Act.) it is provided that such registration shall be effected "on a certificate given by the registrar or clerk of the court." It will be observed that the deputy registrar is included in the Chancery act and excluded in the Registration act.





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Issues out of
Chancery may
be tried without
feigned issues at
law.

Or by the Court
of Chancery or a
judge thereof.

mence any feigned action in a court of law; but upon an office copy of the decree or order directing the trial of the issue being entered for trial in the same manner as a *nisi prius* record is entered, the issue shall be tried at the assizes, or at the sittings of a county court in Upper Canada, in the same manner as issues are tried in actions brought in the superior courts of law or in the county courts, and the finding of the jury shall be endorsed upon such office copy and signed by the presiding judge, and the office copy shall then be transmitted to the registrar of the Court of Chancery; or instead of directing an issue to be tried at law, the court may try the same by a jury without the intervention of a court of common law, and may issue a precept or order directed to the sheriff of any county the court sees fit, requiring him to strike and summon a jury for that purpose; and at the trial, one judge or more of the Court of Chancery may sit or preside. 20 Vic., ch. 56, sec. 13. (h)

(h) This section is similar in substance, though not in form, to the English act 21 & 22 Vic., ch. 27, sec. 3. (The Chancery Amendment Act.) Under that act it has been decided that if either party wishes to have the issue tried before a common law court, the trial will not, except under special circumstances, be directed to take place before a jury summoned before the Court of Chancery, (Peters v. Rule, 7 W. R. 171,) and see also Lister v. Bell, 28 L. J. Ch. 162; 5 Jur. N. S. 116. It would appear also from the English authorities that a trial by jury will not be directed until the cause has been heard except perhaps by consent; (Gray v. Haig, 20 Beav. 219; Robinson v. Anderson, 7 DeG. M. & G. 239; George v. Whitmore, 26 Beav. 557; 7 W. R. 225; 28 L. J. Ch. 720; an interlocutory motion therefore was refused.) (Bonsor v. Bradshaw, 4 Jur. N. S. 1011; Bradley v. Bevington, 4 Drew. 511; 7 W. R. 429.)

The order directing the issue should contain a direction that the depositions of witnesses be read at the trial in case the witnesses shall be then dead. (Palmer v. Lord Aylesbury, 15 Ves. 176.) Such a direction will not be made however where the issue is conducted on one side by persons not parties to the cause. (Johnston v. Todd, 3 Beav. 218.)

It is a rule almost decisive, that when the evidence stands quite alone the court will not send the question to a trial at law, and it would seem therefore that a party is not either as of right or as matter of judicial discretion entitled to an issue merely because the court may be against him on the facts. (Boulton v. Robinson, 4 Grant, 141.) Where the party is not entitled as of right to the issue, and it is a mere matter of discretion with the court, there should be something to induce the court to believe that the balance of competency as to trying the question of fact would be in favour of a jury. (*Ibid.*)

PARTIES.

70. In any suit instituted in the Court of Chancery by a mortgagee or judgment creditor, or by any other person having a charge on real property, for the foreclosure or sale of property, and to which suit any judgment creditor of the mortgagor or of the judgment debtor, or of the person liable to the charge, is a defendant, personal service on such defendant shall not be necessary, and it shall be sufficient to serve the process of the court, whether the same be an office copy of the bill or an office copy of the decree or decretal order, upon his attorney in the action at law in which the judgment has been

Service in proceedings for foreclosure or sale how made.

It is usual to give the defendant the option of an issue where the court decides against him on the question of facts sworn to in his answer and contradicted by the evidence of one witness and collateral circumstances. (*Ibid.*)

In England also where the evidence is conflicting, the court feeling sensible of the deficiencies of a trial upon written evidence will generally grant an issue, (*Ibid.*) and see *Baker v. Wilson*, 6 Grant, 608; 4 U. C. L. J. 260; this rule will of course apply with much less force here where the evidence is taken before the judge himself.

The general rule may be stated to be that the court will direct an issue only when it entertains a reasonable doubt as to the fact, and when it depends on evidence the effect of which can be better ascertained before a jury. (*Shert v. Lee*, 2 J. & W. 496.)

On an issue the Court of Chancery reserves to itself the review of all that passes at law, the motion for a new trial is made to the court directing the issue, and not to the court by which it is tried, (*Bootle v. Blundell*, 19 Ves. 500,) and therefore, upon the trial of an issue a bill of exceptions for an alleged misdirection of the judge will not lie, the regular course is to apply to the court which directed the issue for a new trial. (*Armstrong v. Armstrong*, 8 M. & K. 45.)

Where an issue is ordered, and the party plaintiff therein does not proceed to trial of it at the time appointed, it will be taken *pro confesso* against him. (*Casborne v. Barsham*, 5 M. & C. 118; *Hartland v. Dancocks*, 5 DeG. & Sm. 561; *Anon.*, 4 Mad. 255;) and if notice of trial has been served the Court of Chancery will give costs; (*Anon.*, 2 P. W. 67;) but under particular circumstances this rule will not be applied, as where material witnesses were unable to attend at the trial; (*Hargrave v. Hargrave*, 8 Beav. 289;) or where a negotiation for compromise had taken place. (*Johnston v. Todd*, 8 Beav. 218.)

See further as to issues directed by the Court of Chancery here, and the grounds therefor, *In re Brennan*, 2 Grant, 274; *Macaulay v. Proctor*, 2 Grant, 890; *Watson v. Munro*, 5 Grant, 662; 6 Grant, 385; on appeal, 8 Grant, 80; 6 U. C. L. J. 181; and see the remarks of *Robinson, C. J.*, in this last case, 8 Grant, 68; 6 U. C. L. J. 182.

recovered; but the plaintiff in any such suit in Chancery may elect to serve the judgment creditor personally instead of serving the attorney. 20 Vic., ch. 56, sec. 14. (i)

ABSENTEES.

Service on absentees.

71. An absent defendant may be served at any place out of the jurisdiction of the court, with a copy of any bill or proceeding, without an application being previously made to the court for the allowance of such service, and the service shall be allowed on proof to the satisfaction of the court that the same was duly made. 20 Vic., ch. 56, sec. 15. (k)

MONEY IN COURT.

Money in court, how to be disposed of.

72. All moneys that become subject to the control and distribution of the court, shall be paid in the name of the accountant-general of the court into the hands of such person or body corporate, or be vested in the name of the accountant-general in the public funds of the province, or in such other securities, as the court from time to time directs; and all interest arising from the sums so deposited or vested, shall be added to the principal sum, and be distributed therewith to the persons entitled to receive the same. 7 Wm. IV., ch. 2, sec. 7. (l)

(i) The use which the practitioner may make of this section, and the cases which have been decided upon it, (*Munro v. Keiley*, Grant's Chambers, 23; *Cameron v. Phipps*, *Ibid.*, 4; *Webster v. O'Closter*, 6 Grant, 278; and others,) are fully cited and enumerated upon in the earlier part of this volume under the sections having reference thereto, but practically as by 24 Vic., ch. XLI., repealing the act relating to the registration of judgments, creditors, *qua* judgment creditors, are not made parties to suits in equity, and there seems to be no doubt that service on the attorney in the action of law in which the judgment has been recovered of a creditor plaintiff who has a *fi. fa.* against lands in the sheriff's hands, and by virtue of which he is made a party to a suit, would not be good service on him, the creditor being made a party now by virtue of his *fi. fa.*, and not by virtue of his judgment.

(k) See Order of 10th January, 1863, pp. 284, *et seq.*, *supra*, and see pp. 33, *et seq.*

(l) See Order XLIII., of June, 1863, sec. 8, p. 211, *supra*, see *Leonard v. Black*, 4 U. C. L. J. 260, as to discretion of the court in ordering money to be paid in, which is in the hands of a sheriff.

FEE FUND.

73. A fee of ten cents shall be paid to the registrar ^{Fees to be taken to form a suitor's fee fund.} or deputy-registrar, on the filing of every bill and of every answer or demurrer, in addition to other fees and charges thereon; and such fee shall be paid in to an account to be called "The Suitors' Fee Fund Account," which account shall be kept and managed as may from time to time be directed by the court, and the sums, at the credit of such account, shall be applied by the court as may be necessary for the protection of infants and other persons not *sui juris* on whose behalf proceedings may be had in the court, or may, by the court, be ordered to be had in other courts. 20 Vic., ch. 56, sec. 20.

GENERAL ORDERS.

74. All general orders of the court existing when this act takes effect are hereby confirmed and declared to be as effectual as if the same were hereby specially enacted; but the same may, from time to time, be suspended, repealed, varied and re-enacted by the court, and shall, in all respects be subject to the control and direction of the court and the respective judges thereof, as in the case of any other general orders which the court is empowered to make under the general or other jurisdiction thereof. ^{Existing orders to continue until altered, &c.} 20 Vic., ch. 56, sec. 21; 12 Vic., ch. 64, sec. 9.

75. The court may, from time to time, make such ^{The court empowered to make orders.} general orders as to the court may seem expedient, for regulating the offices of the masters and registrars, and for regulating and securing the due performance of the duties of all the officers of the court, and for regulating and adapting to the circumstances of this province the practice and proceedings of the court, and more especially the nature and form of the process and pleadings, the taking, publishing, using and hearing of testimony, the examination of the parties to a suit upon their oaths,

viva voce or otherwise, the allowance and amount of cost and every other matter deemed expedient for better attaining the ends of justice, and advancing the remedies of suitors; and the court may, from time to time, suspend, repeal, vary or revive any such orders, but no such order shall have the effect of altering the principles or rules of decision of the Court. 12 V., c. 64, s. 11.—*See* c. 72, s. 7—7 W. 4, c. 2, s. 4—20 V., c. 56, s. 21.

PRISONS.

Gaols to be prisons of the court.

76. All gaols in Upper Canada shall be prisons for the court. 7 W. 4, c. 2, s. 14—9 V., c. 10, s. 14.

AN ACT RESPECTING THE COURT OF ERROR AND APPEAL.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CH. XIII.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

EXISTING COURTS CONTINUED.

The Court of Appeal continued.

1. The "Court of Error and Appeal," at present existing in Upper Canada, is hereby continued, and shall be called the Court of Error and Appeal. 12 V., c. 63, s. 38.

THE JUDGES IN APPEAL.

Who to compose the court.

2. The judges for the time being of the courts of Queen's Bench, Chancery, and Common Pleas in Upper Canada, shall be *ex officio* members of the Court of Appeal. 20 V., c. 5, s. 2.

Retired judges may be added.

3. The Governor may, by commission under the great seal, from time to time, appoint any retired judge of any of the said superior courts as an additional judge of the Court of Error and Appeal. 20 V., c. 5, s. 2.

Rank of.

4. Every person so appointed shall take such rank and precedence, after the Chief Justice of Upper Canada, the Chancellor of Upper Canada, and the Chief Justice of the Court of Common Pleas, as may be designated in his commission. 20 Vic., ch. 5, sec. 2.

WHO TO PRESIDE.

5. [This section is repealed by 25 Vic., ch. XVIII., The Chief Justice to preside.
secs. 1, 2, 3.]

QUORUM.

6. Seven members of the court shall be necessary to Seven members to be a quorum.
constitute a quorum. 20 Vic., ch. 5, sec. 4.

CLERK.

7. The registrar of the Court of Chancery shall ex Who to be clerk.
officio be clerk of the Court of Error and Appeal. 12
Vic., ch. 63, sec. 43.

TIMES AND PLACE OF SITTING.

8. The Court of Error and Appeal shall hold its The court to sit at Toronto three times a year.
sittings at the city of Toronto, on the second Thursday
next after the several Terms of Hilary, Easter, and
Michaelmas, and may adjourn from time to time, and
meet again at the time fixed on the adjournment, for the
transaction of business. 20 Vic., ch. 5, sec. 4. (m)

JURISDICTION AND POWERS.

9. The court shall have an appellate civil and criminal Jurisdiction of the court.
jurisdiction throughout Upper Canada, and an appeal
shall lie thereto from all judgments of the Courts of
Queen's Bench and Common Pleas, and from all judg-
ments, orders, and decrees of the Court of Chancery. 12
Vic., ch. 63, sec. 40.

10. The court shall have power to quash proceedings May quash proceedings; when.
in cases brought before it, in which error or appeal does
not lie, or where such proceedings are taken against
good faith, or in which proceedings might heretofore

(m) This section is altered by 25 Vic., ch. XVIII., sec. 4.

By this act the times for the sitting of the court are to be the fourth Thursday
next after the several terms of Hilary, Easter, and Michaelmas. The court may ad-
journ from time to time and meet again at the time fixed on the adjournment for
the transaction of business.

have been quashed in the court, according to the law and practice in England. 20 Vic., ch. 5, sec. 6.

May dismiss appeal; when.

11. The court shall have power to dismiss an appeal, or to give the judgment or decree and to award the process or other proceedings which the court whose decision is appealed against ought to have given, without regard to the party alleging error, and may also award restitution and payment of costs. 20 Vic., ch. 5, sec. 7. (n)

(n) In *Smith v. Norton*, 7 U. C. L. J. 263, in appeal, it was held that the Court of Appeal sits as a court of law or equity, according as the appeal comes from the common law courts or Chancery. This case came from common law, and was a question of dower. *Hagarty, J.*, in his judgment, remarked, "If there is relief in equity, it is a pity that the case did not go to equity, for it may yet go to a court of equity and come up before us again, and we may then have to give a judgment the opposite to that we are now giving. I think it a pity we cannot dispose of it at once in both law and equity. But we have only to dispose of the case as a court of law, and in that view I am clearly of opinion the widow is entitled to her dower." In *Evans v. Evans*, 9 U. C. L. J. 71, (in appeal,) which was a suit for specific performance, it was objected that as the decreeing specific performance of a contract is discretionary, this court would not interfere with the judicious exercise of that discretion by the court below, to which the same particularly belongs. *Robinson, C. J.*, said as to this ground of objection, "That is true in a limited sense, but not universally, or there would scarcely be an appeal in any suit of this description; whereas we have had many, and shall, not improbably, have to dispose of more. It is no doubt within the authority of an appellate jurisdiction to determine in this case, as in others, whether the judgment of a court of equity in a matter which may be admitted to be in some measure discretionary, has been given in accordance with the general principles which in such cases govern courts of equity. It need hardly be said that a judgment decreeing specific performance may in many more instances be found the subject of an appeal, than a judgment refusing it. This is an order of the former kind."

It was held by the Court of Appeal, *In re Freeman, Craigie, and Proudfoot*, 8 U. C. L. J. 267, that the right of appeal from Chancery is confined to orders or decrees made in a cause pending between parties, and that where an appeal was made to the Court of Error and Appeal from an order directing the taxation of a solicitor's bill against his client in a particular mode, the court dismissed the appeal with costs. It was also held that the respondent, although he might, was not bound in such a case to move at an earlier stage to quash the proceedings. *Robinson, C. J.*, in delivering judgment in this case, said, "We think the proceedings in appeal must be quashed under the 10th section of the Appeal Act, on the ground that this is not an appealable matter, there being no cause pending between the parties, in which the order complained of was made. It is true that the 9th section of the act gives an appeal 'from all judgments, orders, and decrees of the Court of Chancery;' but that has been always taken to mean judgments, orders, and decrees, whether interlocutory or final in a cause. The 54th section of the act shews that to be the intention; and the general principles which govern appeals in equity preclude an appeal from such an order as this." See *McQueen on Appeals*, ch. 1.

DUTIES OF CLERK.

12. The judgment, decree, or award shall be certified by the clerk of the Court of Error and Appeal to the proper officer of the court below, who shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon, as if the judgment, decree or award had been given in the court below. 20 Vic., ch. 5, sec. 7.

The clerk to certify result of appeals.

APPELLANTS MAY DISCONTINUE.

13. An appellant may discontinue his proceedings by giving to the respondent a notice headed in the court and cause, and signed by the appellant or his attorney, stating that he discontinues such proceedings; and thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the court below, and may take all further proceedings in that court as if no appeal had been brought. 20 Vic., ch. 5, sec. 8.

Appellants may discontinue.

RESPONDENTS MAY ASSENT TO REVERSAL.

14. A respondent may consent to the reversal of the judgment, decree, or proceeding appealed against, by giving to the appellant a notice headed in the court and cause, and signed by the respondent or his attorney, stating that he consents to the reversal of the judgment, decree or other proceeding, and thereupon the court shall pronounce judgment of reversal as of course. 20 Vic., ch. 5, sec. 9.

A respondent may consent to a reversal of the judgment or decree, &c.

SECURITIES.

15. No appeal shall be allowed until the appellant has given proper security to the extent of four hundred dollars, to the satisfaction of the court from whose order, decree, or judgment he is about to appeal, that he will effectually prosecute his appeal, and pay such costs and

Appellants to give security.

damages as may be awarded in case the judgment or decree appealed from be affirmed. 12 Vic., ch. 63, sec. 40. *The proviso and see post, secs. 17, 35, 59 & 60.*

STAY OF EXECUTION.

When perfected,
execution to be
stayed.

16. Upon the perfecting of such security, execution shall be stayed in the original cause, except in the following cases: 12 Vic., ch. 63, sec. 40.

EXCEPTIONS.

Subject to certain
exceptions in
which partial
performance is
required by de-
livery into court.

1. If the judgment or decree appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment or decree shall not be stayed until the things directed to be assigned or delivered have been brought into court, or placed in the custody of such officer or receiver as the court appoints, nor until security has been given to the satisfaction of the court appealed from, and in such sum as that court directs, that the appellant will obey the order of the appellate court. 12 Vic., ch. 63, sec. 40, No. 2.

Or by executing
the instrument.

2. If the judgment or decree appealed from directs the execution of a conveyance or any other instrument, the execution of the judgment or decree shall not be stayed until the instrument has been executed and deposited with the proper officer of the court appealed from, to abide the judgment of the appellate court. 12 Vic., ch. 63, sec. 40, No. 3.

Or by the giving
of special secu-
rity not to com-
mit waste.

3. If the judgment or decree appealed from directs the sale or delivery of possession of real property or chattels real, the execution of the judgment or decree shall not be stayed until security has been entered into to the satisfaction of the court appealed from, and in such sum as that court directs, that during the possession of the property by the appellant he will not commit or suffer to be committed any waste on the property, and that if the judgment be affirmed, he will pay the

value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, and also, in case the judgment or decree is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency. 12 Vic., ch. 63, sec. 40, Nos. 4 & 5.

4. If the judgment, order, or decree appealed from directs the payment of money, the execution of the judgment or decree shall not be stayed until the appellant has given security, to the satisfaction of the court appealed from, that if the judgment, order, or decree, or any part thereof, be affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed if it be affirmed only as to part, and all damages awarded against the appellant on the appeal. 12 Vic., ch. 63, sec. 40, No. 1. (c)

Or to pay debt
and costs.

(c) This section does not apply to mortgage cases. (The Bank of Upper Canada v. Pottroff, 8 U. C. L. J. 328.) The appellant in this case was the assignee of a mortgage. The plaintiffs were judgment creditors of the mortgagor. The question was one of priority, and was decided in favour of the plaintiffs. From this decision the assignee of the mortgage appealed. *Spragge*, V. C., said, "I am satisfied this does not come within the exceptions of the act, and that the ordinary bond is all that the applicant is required to give."

In *Gamble v. Howland*, 3 Grant, 281, 303, the defendant appealed from an order directing his committal for breach of an injunction, and moved the Court of Chancery to stay proceedings under the order, pending the appeal, which was refused. The defendant had in this case filed the usual appeal bond. *Spragge*, V. C., in delivering judgment, said, "Neither the act nor the general orders of the Court of Appeal provide for an application to the court to stay proceedings pending appeal, except in the cases excepted by the 40th section, (sec. 16, Con. Stat.,) and in these cases provision is made for security to meet the exigency of each of those excepted cases, additional to the ordinary security given upon every appeal." The judgment of the learned V. C., pp. 304-309, in this case gives a very clear interpretation of this section, and should be referred to.

In *Cotton v. Corby*, 7 Grant, 51, 72; 5 U. C. L. J. 67; it was held that the Court of Chancery has full power, notwithstanding the Error and Appeal Act, to suspend the operation of its decree, so as to allow an appeal to be made to the court above. It was submitted in this case that as no amount was directed to be paid by the judgment of the court, and that the bill having been dismissed, the case was no longer before the court. (See sub-sec. 4.) The court in its judgment (referring to the *Mayor of Gloucester v. Wood*, 3 Hare, 150,) said, "although the Vice-Chancellor

When given, a
fiat to stay exe-
cution to be
granted.

17. When the security has been perfected and allowed, any judge of the court appealed from may issue his *fiat* to the sheriff to whom any execution on the judgment or decree has issued, to stay the execution, and the execution shall be thereby stayed whether a levy has been made under it or not. 18 Vic., ch. 123, sec. 1.

WHEN EXECUTION SUPERSEDABLE.

Execution may
be superseded, or
payment of
money levied be
withheld.

18. If at the time of the receipt by the sheriff of the *fiat*, or of a copy thereof, the money has been made or received by him, but not paid over to the party who issued the execution, the party appealing may demand back from the sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the sheriff upon such demand, the appellant may recover the same from him in an action for money had and received. 18 Vic., ch. 123, sec. 2.

DEATH OR MARRIAGE NOT TO ABATE.

Death of appel-
lant not to abate
the appeal;

19. The death of the appellant after the security has been perfected and allowed shall not cause the appeal to abate. 20 Vic., ch. 5, sec. 10.

had dismissed the bill, he had directed the fund in court to be retained until the appeal from its decision could be heard. The orders of the Court of Error and Appeal were not intended, nor do they interfere in any way with the equitable jurisdiction of this court; and as it cannot be said that the decision arrived at is free from doubt, and allowing the execution to be enforced would undoubtedly be of great injury to these executors, if the court above should take a different view of the rights of the parties to what has been taken by this court, we think the safer course will be to stay proceedings." In this country the legislature has laid down the rule that not staying proceedings in appeal shall be the rule, and staying them the exception.

In the case of *The Commercial Bank v. The Bank of Upper Canada*, Grant's Cham. R. 64, an injunction was granted (with liberty to move at any time to dissolve) to restrain a sale of mortgaged property pending an appeal in a suit to set aside the mortgage. A motion was afterwards made to dissolve the injunction or vary the order to stay the sale, and the mortgagor consenting, the order was varied by directing the amount due on the mortgage to be paid into court to await the decision in the appeal. (*Ibid.*)

20. The death of the respondent shall not cause the appeal to abate. 20 Vic., ch. 5, sec. 11. Nor of the respondent;

21. The marriage of a woman appellant or respondent shall not abate the appeal, but the proceedings in error and appeal shall go on as if no such marriage had taken place, and the decision of the court shall be certified as in other cases. 20 Vic., ch. 5, sec. 12. Nor the marriage of a feme sole.

Secs. 22 to 51 inclusive have especial reference to appeals from the Court of Queen's Bench and Common Pleas in cases other than judgments or matters of record.

APPEALS FROM THE COURT OF CHANCERY.

52. A party desirous of appealing from any decree or order in Chancery, shall file a petition of appeal with the clerk of the Court of Error and Appeal, and shall serve a copy thereof, together with a notice of the hearing of the appeal, on the respondent, his solicitor or agent, at least two months before the time named in such notice for the hearing of the appeal. 20 Vic., ch. 5, sec. 34. Appeals from Chancery by petition.

53. Such petition shall not be answered, but proceedings shall go on as if the petition had been answered, and as if the time named in the notice had been appointed by the court for hearing the appeal. Petition not to be answered, when to be heard.

54. The petition shall be in the following form:

"IN THE COURT OF ERROR AND APPEAL.

"Between A. B., appellant, and C. D., respondent.

"To the honourable the judges of the said court.

"The petition of the said A. B. sheweth:

"That a decree (or order) was on pronounced by Her Majesty's Court of Chancery for Upper Canada, in a certain cause depending in the said court, wherein your petitioner was plaintiff (or defendant), and the above named C. D. was defendant (or plaintiff), which said decree (or order) has been duly entered and enrolled. Form of petition of appeal.

"That your petitioner hereby appeals from the said
 "decree (*or order*), and prays that the same may be
 "reversed or varied, or that such other decree (*or order*)
 "in the premises may be made as to your honourable
 "court seems meet.

"And your petitioner will ever pray, &c."

(Certificate of counsel to be added.)

20 Vic., ch. 5, sch. A. 3.

Within what
 time appeals
 must be brought
 to a hearing.

55. In case of an appeal from the Court of Chancery, the appellant shall bring the same to a hearing, if the appeal is from a decree or decretal order, within one year from the pronouncing thereof; and if the appeal is from an interlocutory order, not being a decretal order, then within six months from the pronouncing of the same, or within such further time in either case as may be allowed for the purpose by the Court of Error and Appeal, or by the Court of Chancery, or a judge thereof, upon special grounds shewn to the satisfaction of the court or judge granting the same. 20 Vic., ch. 5, sec. 35.

Time to be
 reckoned from
 the decree or
 order becoming
 absolute.

56. As to a decree or order which, under any general orders of the Court of Chancery, does not become absolute upon the same being pronounced, the time limited for appealing therefrom shall be computed from the time when the same does become absolute. 20 Vic., ch. 5, sec. 35.

APPEALS TO HER MAJESTY IN HER PRIVY COUNCIL.

Appeal final in
 matters not ex-
 ceeding \$4000.

57. The judgment of the Court of Error and Appeal shall be final where the matter in controversy does not exceed the sum or value of four thousand dollars. 12 Vic., ch. 63, sec. 46.

When appeal
 may be to the
 Queen in Privy
 Council.

58. In a case exceeding that amount, as well as in a case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public

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nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to Her Majesty in her Privy Council. 12 Vic., ch. 63, sec. 46.

59. But no such appeal shall be allowed until the appellant has given security in two thousand dollars, to the satisfaction of the court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the judgment or decree appealed from be affirmed. 12 Vic., ch. 63, sec. 46. Security to be given.

60. Upon the perfecting of such security, execution shall be stayed in the original cause. 12 Vic., ch. 63, sec. 46, and see ante secs. 16, 17, 35. The execution to be stayed.

61. But the provisions of the sixteenth section of this act shall apply to such appeal, and the completion of the security hereby required shall not have the effect of staying execution in the cause, in the different cases to which the said section relates, unless the provisions in the said section be complied with. 12 Vic., ch. 63, sec. 46. The 16th section to apply.

62. Every judge of the Court of Error and Appeal shall have authority to approve of and allow the security to be given by a party who intends to appeal to her Majesty in her Privy Council, whether the application for such allowance be made during the sitting of the said court, or at any other time. 20 Vic., ch. 5, sec. 36. The judges may approve of the securities.

63. Costs awarded by her Majesty in her Privy Council, upon an appeal, shall be recoverable by the same process as costs awarded by the Court of Error and Appeal. 20 Vic., ch. 5, sec. 37. Costs in final appeal.

GENERAL RULES.

64. The judges of the Court of Error and Appeal, or any five or more of them, of whom the Chief Justice of Upper Canada and the Chancellor shall be two, may from time to time make such general rules and orders

The judges of
Court of Appeal
may make rules,
&c.

for the effectual execution of this act, and of the intention and object hereof, and for fixing the costs to be allowed in respect of proceedings in the court, and for regulating the different proceedings in appeal, as to them may seem expedient; and may also from time to time alter and amend any of the existing rules, or any rules made under the authority of this act, and make other rules instead thereof; and until such rules be made, the present rules and existing practice and mode of proceeding in the court shall continue in force. 20 Vic., ch. 5, sec. 38.

THE CLERK'S FEES AND ACCOUNTS.

The clerk not to
take fees except
for the fee fund.

65. The clerk of the Court of Appeal shall not take for his own use or benefit, directly or indirectly, any fee or emolument whatever except the salary to which he is entitled as registrar of the Court of Chancery, and all fees received by or on account of the registrar, as clerk of the Court of Appeal, shall form part of the consolidated revenue fund of the province. 12 Vic., ch. 63, sec. 43.

He is to account
to Minister of
Finance quar-
terly for all fees
received, &c.

66. The clerk of the Court of Error and Appeal shall, on the first day of January, April, July, and October in every year, render to the Minister of Finance a true account in writing, of all the fees received by or on account of the office of clerk, in such form and with such particulars as the Minister of Finance from time to time requires; and such accounts shall be signed by the clerk, and the correctness thereof shall be by him declared before one of the judges of the court; and the clerk shall, within ten days after the rendering of the account, pay over the amount of the fees to the Receiver-General, and in case of default, the amount due by the clerk shall be deemed a specialty debt to her Majesty. 12 Vic., ch. 63, sec. 44.

ACT RESPECTING COUNTY COURTS.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAPTER XV.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

REMOVAL OF SUITS.

57. Any claim entered on the equity side of a county court may be removed by either party into the court of Chancery, by order of that court, to be obtained on a summary application, by motion or petition, supported by affidavit, of which reasonable notice shall be given to the opposite party, and the order shall be made on such terms as to payment of costs, giving security in respect to the relief claimed and costs, or upon such other terms as to the Court of Chancery may seem just; but no claim shall be removed, unless the Court of Chancery be of opinion that the nature of the claim renders it a proper one to be withdrawn from the jurisdiction of the county court, and disposed of in the Court of Chancery, and the said Court of Chancery shall make the necessary regulations for the practice to be observed in proceedings under this section. 16 Vic., ch. 119, sec. 17.

In certain cases claims may be removed into Chancery.

58. In order that the mode of proceeding under this act may be fully traced out, and from time to time improved and rendered as simple, speedy, and cheap as may be, it shall be the duty of the judges of the Court of Chancery to frame such general rules and orders and all such forms as to them may seem expedient, concerning the process, practice, orders and proceedings on the equity side of the county courts under this act, and in relation to any of the provisions thereof as to which there may arise doubts; and from time to time to alter and amend such rules, orders and forms, and also the forms and mode of procedure prescribed by this act; and such rules, orders and forms as may be made and

Chancery to frame general rules and orders;
May amend the same.

Their effect.

framed by the judges, or any two of them (of whom the Chancellor of Upper Canada shall be one) shall, from and after a day to be named therein, be in force in every county court, and shall be of the same force and effect as if the same had been embodied in an act of parliament. 16 Vic., ch. 119, sec. 19.

Costs restrained.

63. If any suit or proceeding be commenced in the Court of Chancery for any cause or claim which might have been entered in a county court, no costs shall be taxed against the defendant in such suit or proceeding, and the defendant, if he succeeds in the suit, shall be entitled to a decree against the plaintiff for his costs, as between attorney and client, unless the Court of Chancery be of opinion that it was a fit cause or claim to be withdrawn from a county court, and entered in the Court of Chancery. 16 Vic., ch. 119, sec. 22.

Existing rules continued.

65. The rules and orders made by the Court of Chancery, and now in force for the regulation of the practice of the county courts in suits in equity, shall continue until altered under the authority of this act.

APPEALS FROM THE COUNTY COURTS TO CHANCERY.

An appeal given to Chancery.

69. Either party may appeal to the Court of Chancery against any order or decree made by the judge of a county court under the equity jurisdiction conferred by this act; and the Court of Chancery shall make such order thereupon in respect to costs or otherwise, or for referring back the matter to the judge before whom the same was first heard, as may be just and proper; but before the county court judge is called on to certify to the Court of Chancery, the order or other matter appealed against, the party appealing shall enter into a recognizance, with sufficient sureties to the satisfaction of the judge, to pay the sum decreed in case relief be not had on the appeal, or to obey the order; (or as the case may be;) and when the party appealing appears by attorney,

A recognizance to be entered into.

an affidavit shall be made by the attorney, that the appeal is not intended for delay as he believes, and that there is, in his opinion, probable cause for reversing the order or decree against which the appeal is made; and the Court of chancery shall specially make the necessary regulations for the practice to be observed in proceedings under this section. 16 Vic., ch. 119, sec. 18.

The Court of Chancery may make regulations.

AN ACT RESPECTING THE SURROGATE COURTS.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAPTER XVI.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

APPEALS TO CHANCERY.

26. Any person considering himself aggrieved by any order, sentence, judgment, or decree of any surrogate court, or being dissatisfied with the determination of the judge thereof in point of law in any matter or cause under this act may, within fifteen days next after such order, sentence, judgment, decree or determination, appeal therefrom to the Court of Chancery, in such manner and subject to such regulations as may be provided for by the rules and orders made under the Surrogate Courts Act, 1858, or under this act, and the said Court of Chancery shall hear and determine such appeals; but no such appeal shall be had or lie unless the value of the goods, chattels, rights, or credits to be affected by such order, sentence, judgment, decree or determination, exceeds two hundred dollars. 22 Vic., ch. 93, sec. 20.

Persons considering themselves aggrieved by any judgment, &c., may appeal to Chancery.

Appeals not to lie in certain cases.

REFERENCE TO A SUPERIOR COURT.

27. In every case in which there is contention as to the grant of probate or administration, and the parties in such case thereto agree, such contention shall be

In cases of contention, the matter may, by

consent, be referred for adjudication to one of the superior courts.

referred to and determined by either of her Majesty's superior courts of law, or by the Court of Chancery, on a case to be prepared, and the surrogate court having jurisdiction in such matter shall not grant probate or administration until such contention be terminated and disposed of by judgment, decree, or otherwise. 22 Vic., ch. 93, sec. 21.

REMOVAL TO THE COURT OF CHANCERY.

In certain cases of contention, matter to be referred to Chancery.

28. Any cause or proceeding in the said surrogate courts in which any contention arises as to the grant of probate or administration, or in which any disputed question may be raised (as to law or facts) relating to matters and causes testamentary, shall be removable by any party to such cause or proceeding into the Court of Chancery by order of a judge of the said court to be obtained on a summary application supported by affidavit, of which reasonable notice shall be given to the other parties concerned. 22 Vic., ch. 93, sec. 22.

Terms as to costs.

Certain cases not to be so removed.

Powers of the Court of Chancery and transmission of final order to surrogate court.

29. The judge making such order may impose such terms as to payment or security for costs or otherwise, as to him may seem fit; but no cause or proceeding shall be so removed unless it be of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the surrogate court, and disposed of by the Court of Chancery, nor unless the personal estate of the deceased exceeds two thousand dollars in value. 22 Vic., ch. 93, sec. 22.

30. Upon any cause or proceeding being so removed as aforesaid, the Court of Chancery shall have full power to determine the same, and may cause any question of fact arising therein to be tried by a jury, and otherwise deal with the same as with any cause or claim originally entered in the said Court of Chancery; and the final order or decree made by the said Court of Chancery in any cause or proceeding removed as afore-

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said, shall, for the guidance of the said surrogate court, be transmitted by the surrogate clerk to the registrar of the surrogate court from which such cause or proceeding was removed. 22 Vic., ch. 93, sec. 22. (p)

SURROGATE CLERK.

31. There shall be a clerk appointed, to be called the surrogate clerk, who shall perform the duties required of the surrogate clerk by this act, as well as the duties that by the rules and orders made as hereinbefore mentioned may be required of such surrogate clerk, and also such other duties as may be required of him by the Court of Chancery, and such surrogate clerk shall be deemed an officer of the said Court of Chancery, and be paid a fixed salary, not exceeding one thousand six hundred dollars yearly, and the governor shall from time to time appoint and at his pleasure remove such clerk. 22 Vic., ch. 93, sec. 23.

Surrogate clerk to be appointed; his duties.

His salary.

42. In case it appears by the certificate of the surrogate clerk that application for probate or administration has been made to two or more surrogate courts, the judges of such courts respectively shall stay proceedings therein, leaving the parties to apply to one of the judges of the said Court of Chancery to give such direction in

Proceeding if application has been made to more than one surrogate court.

To be decided in Chancery.

(p) Where a motion was made under this act to remove a cause on the ground of a contest as to whom administration should be granted, and that it was necessary, therefore, that the cause should stand over till term, which would cause delay, the court refused the motion, as the surrogate court has power by sec. 36 of the act to appoint an administrator *pendente lite*, and that, therefore, no ground of delay could be urged. (*In re Beckwith*, 5 U. C. L. J. 256.) It would seem that to justify the removal of a suit from a surrogate court, there should be a disputed question of law or fact proper to be adjudicated on by the Court of Chancery. (*Ibid.*)

In cases which by this act are proper to be removed to the Court of Chancery, the court will not restrict the parties to surrogate court costs on the proceedings in Chancery. (*In re Lee and Waterhouse*, 5 U. C. L. J. 256.)

A personal representative cannot be appointed by the Court of Chancery on a motion to remove a cause from the surrogate court; a petition for that purpose is necessary. (*Ibid.*)

the matter as to him may seem necessary. 22 Vic., ch. 93, sec. 28.

Decree of Chancellor as to what court shall have jurisdiction.

43. On application made to any one of such judges, he shall enquire into the matter in a summary way, and adjudge and determine what surrogate court has jurisdiction, and shall proceed in the matter. 22 Vic., ch. 93, sec. 28.

The judge in Chancery shall determine as to costs.

44. The judge of the Court of Chancery may order costs to be paid by any of the applicants, and the order shall be enforced by the Court of Chancery. 22 Vic., ch. 93, sec. 28.

His decision to be final.

45. The determination of such judge shall be final and conclusive, and so soon as may be after such determination made, the surrogate clerk shall transmit a certified copy thereof to the registrars of the several surrogate courts wherein such applications as aforesaid have been made. 22 Vic., ch. 93, sec. 28.

PROBATE PRIMA FACIE PROOF OF WILL.

In actions concerning real estate, probate, &c., to *prima facie* evidence of will, &c., after certain notice, save where its validity is put in issue.

51. In any action at law or suit in equity where according to the existing law it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, the party intending to establish in proof such devise or other testamentary disposition, may give to the opposite party ten days at least before the trial or other proceeding in which the said proof may be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition, the probate of the will or letters of administration with the will annexed, or a copy thereof, stamped with the seal of the surrogate court granting the same; and in every case such probate or letters of administration or copy thereof, respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents notwithstanding the

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same may not have been proved in solemn form, or have been otherwise declared valid, in a contentious cause or matter as herein provided, unless the party receiving such notice do, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition. 22 Vic., ch. 93, sec. 33.

ADMINISTRATION PENDENTE LITE.

54. Pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the court, in which such suit is pending, may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator other than the right of distributing the residue of such personal estate; and every such administrator shall be subject to the immediate control of the court and act under its direction; and the court may direct that such administrator shall receive out of the personal estate of the deceased such reasonable remuneration as the court thinks fit. 22 Vic., ch. 93, sec. 36.

Administration
pendente lite
may be granted.

Rights and
powers of the
administrator.

PAPERS TO BE PLACED IN COURT OF CHANCERY.

79. All books, records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, deeds, processes, acts, proceedings, writs, documents and every other instrument, relating exclusively or principally to matters and causes testamentary, deposited in the Court of Chancery, by the judge of the court of probate, the registrar thereof, and every other person who had the custody of books, documents and papers, of or belonging to that court, pursuant to the fifty-fifth section of the Surrogate Courts Act, 1858, shall remain so deposited, so as to be easy of reference under the control and direction of the court. 22 Vic., ch. 93, sec. 55.

Judge of former
probate court
and others to
hand over wills,
papers, &c., to
Court of Chan-
cery.

APPEALS TO FORMER PROBATE COURT TRANSFERRED TO
CHANCERY.

Suits by way of
appeal in court
of probate
transferred to
Chancery.

81. All suits by way of appeal from the surrogate court, which, on the first September, one thousand eight hundred and fifty-eight, were pending in the court of probate, and were, by the Surrogate Courts Act, 1858, transferred with all proceedings therein to the Court of Chancery, shall there be dealt with and decided according to the practice of the said court, as shall also all cases then in process of appeal to the said court of probate. 22 Vic., ch. 93, sec. 57.

BONDS TAKEN IN PROBATE COURT ASSIGNABLE.

Bonds taken in
court of probate
may be assigned
by order of
Chancery.

82. The Court of Chancery may order all bonds taken in the court of probate on the grant of administration and in force on the first of September, one thousand eight hundred and fifty-eight, to be assigned, and the same may be enforced in the name of the assignee under the authority of the said Court of Chancery, in the same way as provided for in case of assignment of bonds in the surrogate court. 22 Vic., ch. 93, sec. 58.

AN ACT TO REGULATE THE PROCEDURE OF THE SUPERIOR
COURTS OF COMMON LAW AND OF THE COUNTY COURTS.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAP. XXII.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

AS TO ARBITRATIONS.

Every submission
to arbitration
may be
made a rule of
court, unless
the instrument
forbid it.

176. Every agreement or submission to arbitration by consent, whether by deed, or in writing not under seal, may, on the application of any party thereto, be made a rule of either of the superior courts of law, or of the Court of Chancery, or of a county court in actions pending in such county court, unless such agreement or submission contains words purporting that the parties in-

tended that it should not be made a rule of court. 19 Vic., ch. 43, sec. 97.

177. If in any such agreement or submission it be provided that the same may be made a rule of one particular of the superior courts aforesaid, it shall be made a rule of that court only; and if when there is no such provision, a case has been stated for the opinion of one of the superior courts, and such court is specified in the award, and the document authorising the reference has not before the publication of the award to the parties been made a rule of court, such document shall be made a rule only of the court specified in the award. 19 Vic., ch. 43, sec. 97.

Of what court it may be made a rule, and if a case be stated in the award for the opinion of a court.

178. When in any case the document authorising the reference is or has been made a rule or order of any one of such superior courts, no other of such courts shall have any jurisdiction to entertain any motion respecting the arbitration or award. 19 Vic., ch. 43, sec. 97.

Other courts not to interfere.

179. In case of the appointment of any arbitrator or umpire by, or in pursuance of, any rule of either of the superior courts of common law or of the Court of Chancery, or of any county court, or judge's order, or order of *nisi prius* in any action, or by or in pursuance of any submission or reference, not containing words purporting that the parties intended that such agreement should not be made a rule of any of such superior courts, the power and authority of such arbitrator shall not be revocable by any party to the reference, without the leave of the court by which such rule or order was made, or which is mentioned in the submission, or by leave of a judge of such court; or in case no such court be mentioned in the submission and there be no restriction of jurisdiction as aforesaid, then not without the leave of one of such superior courts, or of a judge thereof, and the arbitrator and umpire shall proceed with the reference notwithstanding any such revocation, and make an award, although the

Submission to arbitration if agreed to be made a rule of court, not revocable without leave of court.

Arbitrator to proceed with reference.

Court may enlarge time for making an award.

person making such revocation do not afterwards attend the reference; and the court, or any judge thereof (*as the case may be*) may, from time to time, enlarge the term for any such arbitrators making their award. 7 Wm. IV., ch. 3, sec. 29.

Witnesses may, by order of the court, be compelled to attend arbitrators.

180. In case of a reference by any such rule or order, or by any such submission as aforesaid, and in case of an application to the court by which such rule or order was made, or to the court mentioned in such agreement, or to any judge thereof, or if no such court be mentioned in the submission and there be no restriction of the jurisdiction as aforesaid, then to one of the superior courts or a judge thereof, setting forth the place of residence of any witness whose presence is desired, such court or judge may by a rule or order for that purpose command the attendance and examination of any witness named in such rule or order, and also the production of any documents mentioned therein. 7 Wm. IV., ch. 3, sec. 30.

Neglect so to do, a contempt of court.

181. If, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, be served, either together with or after the service of such rule or order, the disobedience of any such rule or order shall be deemed a contempt of court, but the person whose attendance is required shall be entitled to the like conduct money, and payment of expenses, and for loss of time, as for and upon attendance at any trial; and no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend for more than two consecutive days, to be named in such order. 7 Wm. IV., ch. 3, sec. 30.

182. In case in any rule or order of reference, or in any such submission to arbitration as aforesaid, it is ordered or agreed that the witnesses upon such reference

shall be examined upon oath, the arbitrator or umpire, or any one arbitrator, shall administer an oath to such witnesses, or take their affirmations in cases where an affirmation is allowed by law instead of an oath. 7 Wm. IV., ch. 3, sec. 31.

When witnesses may be sworn by arbitrators,

AN ACT RESPECTING ARREST AND IMPRISONMENT FOR DEBT.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAP. XXIV.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

IN CHANCERY.

8. The writ of *ne exeat provincia* shall be called a writ of arrest, and no order shall be granted for a writ of arrest unless the party applying for the writ has a cause of suit to at least such an amount, and shows by affidavit such facts and circumstances as this act requires in the case of a special order for holding a party to bail under the fifth section of this act. 22 Vic., ch. 33, sec. 1. (1859.)

In what cases only a writ of arrest shall be granted.

9. In suits for alimony, instituted after this act takes effect, the court or a judge thereof may, in a proper case, order a writ of arrest to issue at any time after the bill has been filed, and shall, in the order, fix the amount of bail to be given by the defendant, in order to procure his discharge. 20 Vic., ch. 56, sec. 3.

In suits for alimony a writ of arrest may be issued.

10. In case an order is made for a writ of arrest, in a suit for alimony, the amount of the bail required shall not exceed what may be considered sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less at the discretion of the court. 22 Vic., ch. 33, sec. 2. (1859.)

Limit of bail in suits for alimony.

11. The bail or security required to be taken under a "writ of arrest" shall not be that the person arrested will not go or attempt to go out of Upper Canada, but

Conditions of
bail-bonds under
writ of arrest.

shall merely be to the effect that the person arrested will perform and abide by the orders and decrees made or to be made in the suit, or will personally appear for the purposes of the suit at such times and places as the court may from time to time order, and will, in case he becomes liable by law to be committed to close custody, render himself (if so ordered) into the custody of any sheriff the court may from time to time direct. 22 Vic., ch. 33, sec. 3. (1859.)

Process of con-
tempt for non-
payment of mo-
ney, costs, &c.,
abolished.

13. Process of contempt for non-payment of any sum of money, or for non-payment of any costs, charges or expenses, payable by any decree or order of the Court of Chancery, or of a judge thereof, or by any rule or order of the Court of Queen's Bench or Common Pleas, or of a judge thereof, or by any decree, order or rule of a county court, or of a judge thereof, is abolished; and no person shall be detained, arrested or held to bail for non-payment of money, unless a special order for the purpose be made on an affidavit or affidavits establishing the same facts and circumstances as are necessary for an order for a writ of *capias ad satisfaciendum*, under this act; and in such case the arrest when allowed shall be made by means of a writ of attachment corresponding as nearly as may be to a writ of *capias ad satisfaciendum*. 22 Vic., ch. 33, sec. 4. (1859.)

Same affidavit
required for an
arrest in such
cases as for a co.
su.

But not when a
writ of arrest
has issued.

14. But in case a party be arrested under a writ of arrest, it shall not be necessary before suing out a writ under the preceding section of this act to obtain a judge's order therefor, or to file any further affidavit than the affidavits on which the order for the writ of arrest was obtained. 22 Vic., ch. 33, sec. 5. (1859.)

Decrees, &c., in
equity for pay-

15. Every decree or order of the Court of Chancery, and every rule or order of the Court of Queen's Bench or Common Pleas, and every decree, order or rule of a county court, directing payment of money or of costs, charges or expenses, shall, so far as it relates to such

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money, costs, charges or expenses, be deemed a judgment, ^{ment of money to be deemed judgments.}
and the person to receive payment a creditor, and the
person to make payment a debtor, within the meaning of
this act; and the said persons shall respectively have the
same remedies, and the courts and judges and the officers
of justice shall in such cases have the same powers and
duties, as in corresponding cases under this act. 22 Vic.,
ch. 33, sec. 14. (1859.)

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WRITS OF FIERI FACIAS AND VENDITIONI EXPONAS.

19. For the purpose of enforcing payment of any
money or of any costs, charges or expenses payable by ^{Decrees, &c., in equity to be enforced by writ of *f. fa.*, &c., as at law.}
any decree or order of the Court of Chancery, or any
rule or order of the Court of Queen's Bench or Common
Pleas, or any decree, order or rule of a county court, the
person to receive payment shall be entitled to writs of
fieri facias and *venditioni exponas* respectively, against
the property of the person to pay, and shall also be en-
titled to attach and enforce payment of the debts of or
accruing to the person to pay, in the same manner
respectively and subject to the same rules, as nearly as
may be, as in the case of a judgment at law in a civil ^{Same rules, &c., to apply as in other cases.}
action; and such writs shall have the like effect as nearly
as may be, and the courts and judges shall have the same
powers and duties in respect to the same and in respect
to the proceedings under the same, and the parties and
sheriff respectively shall have the same rights and reme-
dies in respect thereof, and the writs shall be executed
in the same manner and subject to the same conditions,
as nearly as may be, as in the case of like writs in other
cases; but subject to such general orders and rules vary-
ing or otherwise affecting the practice in regard to the
said matters, as the courts respectively may from time
to time make under their authority in that behalf. 22
Vic., ch. 33, sec. 12. (1859.)

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PERSON HAVING CARRIAGE OF DECREE.

Person having carriage of the decree, &c., to be deemed the plaintiff.

20. In case a decree or order in Chancery, or of a county court in the exercise of the equitable jurisdiction of such county court, directs the payment of money into court or to the credit of any cause, or otherwise than to any person, the person having the carriage of the decree or order, so far as relates to such payment, shall be deemed the plaintiff within the meaning of this act. 22 Vic., ch. 33, sec. 15. (1859.)

SEQUESTRATIONS.

Power of sequestration not taken from Court of Chancery, &c.

21. The Court of Chancery may also issue writs of sequestration as hitherto, or in such cases as by general or other orders the court may think expedient; and nothing in this act shall be construed to take away the jurisdiction of the court under or by means of such writs. 22 Vic., ch. 33, sec. 13.

[The remainder of this section relating to decrees in cases of sequestration, and providing that when registered, to create a charge on real estate, repealed by 24 Vic., ch. XLI., sec. 4.]

COMMON LAW PROCEDURE ACT APPLIED.

Certain clauses of the Common Law Procedure Act incorporated with this act.

22. For the purpose of carrying out the provisions of this act, so far as relates to the Courts of Queen's Bench and Common Pleas, and to the county courts as courts of law, the several provisions of the Common Law Procedure Act shall, so far as applicable and not inconsistent with this act, apply to this act, and sections three hundred and thirty-three to three hundred and forty, and section three hundred and forty-four of the said Common Law Procedure Act, shall be deemed incorporated herewith, as if the provisions therein contained had been repeated in this act and expressly made to apply hereto, and it shall not be necessary to lay before parliament any rules, orders or regulations made for the purpose of this act. 22 Vic., ch. 33, sec. 18. (1859.)

23. The Court of Chancery shall, with reference to the proceedings in the Court of Chancery under this act, and to proceedings under this act in the county courts in the exercise of their equitable jurisdiction, have all the powers which the next preceding section of this act gives to the common law courts, in respect to the cases to which the sections of the Common Law Procedure Act therein specially mentioned refer. 22 Vic., ch. 33, sec. 19. (1859.)

AN ACT RESPECTING THE LAW SOCIETY OF UPPER CANADA.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAPTER XXXIII.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

SCHEDULE OF FEES.

ON PROCEEDINGS IN THE COURT OF CHANCERY.

On filing every bill or amended bill.....	2 40
On passing and entering every decree or decretal order.....	1 00
On every certificate of bill filed, on every certificate of decree or decretal order made, on every subpoena, and on every other writ or certificate issued under the seal of the court..	0 50

ON PROCEEDINGS IN THE COURT OF ERROR AND APPEAL.

On every appeal entered.....	4 00
On every judgment, decree or order of the court passed and entered.....	2 00

ON PROCEEDINGS IN THE OFFICE OF THE SURROGATE CLERK IN CHANCERY.

On every certificate issued by the surrogate clerk in Chancery.....	0 50
On every order made on application to a judge in Chancery	0 25

On entering every appeal.....	0 50
On every decree or order on appeal.....	1 00

AN ACT RESPECTING THE PROPERTY OF RELIGIOUS INSTITUTIONS IN UPPER CANADA.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAPTER LXIX.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

How land in trust may be sold when no longer required by the congregation.

8. When land held by trustees for the use of a congregation or religious body, becomes unnecessary to be retained for such use, and it is deemed advantageous to sell the land, the Trustees for the time being may give public notice of an intended sale, specifying the premises to be sold and the time and terms of sale; and after publication of the notice for four successive weeks, in a weekly paper, published in or near the place where the lands are situated, they may sell the land at public auction according to the notice, but the trustees shall not be obliged to complete or carry a sale into effect if in their judgment an adequate price is not offered for the land.

May be by public or private sale.

9. The trustees may thereafter sell the land either by public or private sale; but a less sum shall not be accepted at private sale than was offered at public sale.

Private sales to be approved of by the Court of Chancery.

10. Before a deed is executed in pursuance of a public or private sale, the congregation or religious body for whose use the lands are held, shall be duly notified thereof, and the sanction of the Court of Chancery obtained for the execution of the deed. 18 Vic., ch. 119, sec. 5; 12 Vic., ch. 91, sec. 2.

Trustees to prepare and shew statements annually.

11. Trustees selling or leasing land under the authority of this act shall, on the first Monday in July in every year, have ready and open for the inspection of the congregation or religious body which they represent, or of any member thereof, a detailed statement shewing all rents which accrued during the preceding year, and all

sums of money whatever in their hands for the use and benefit of the congregation or religious body, which were in any manner derived from the lands under their control or subject to their management, and also shewing the application of any portion of the money, which has been expended on behalf of the congregation or body. 18 Vic., ch. 119, sec. 6.

12. The Court of Chancery may in a summary manner, on complaint upon oath by three members of a congregation or religious body, of any misfeasance or misconduct on the part of trustees in the performance of duties authorised by this act, call upon the trustees to give in an account; and may enforce the rendering of such account, the discharge of any duties, and the payment of any money, so that the congregation or religious body may have the benefit thereof; and the court may compel the trustees, in case of any misconduct, to pay the expense of the application, or may award costs to the trustees in case the application be made on grounds which the court considers insufficient or frivolous or vexatious. 18 Vic., ch. 119, sec. 7.

Trustees may be called upon to account by Court of Chancery.

13. All the rights and privileges conferred upon any religious society or congregation of Christians in the first section of this act mentioned, shall extend in every respect to the Roman Catholic Church to be exercised according to the government of the said church. 3 Vic., ch. 73, sec. 3.

The provisions of s. 1. shall extend to the R. C. Church.

AN ACT RESPECTING THE APPOINTMENT OF GUARDIANS
AND THE CUSTODY OF INFANTS.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CH. LXXIV.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

APPOINTMENT AND DUTIES OF THE GUARDIANS.

1. The right of appointing guardians of infants (such

To what court
the right of ap-
pointing guardi-
ans shall belong.

infants not having a father living or any legal guardian authorised by law to take the care of their persons and the charge of their estates) shall belong exclusively to the surrogate court for the county within which any such infants reside, and letters of guardianship granted by a surrogate court shall have force and effect in all parts of Upper Canada, and an official certificate of the grant may be obtained as in the case of letters of administration, and a return of every appointment and removal of a guardian shall be made by registrars respectively to the surrogate clerk in like manner as in case of grants of probate or administration. 22 Vic., ch. 93, sec. 63; 8 Geo. IV., ch. 6, sec. 4.

In matters of
guardianship,
courts to have
same powers for
examination of
witnesses and en-
forcing decrees,
&c., as in testa-
mentary matters.

2. In all matters and applications touching or relating to the appointment, control or removal of guardians of any such infants and the security to be given by such guardians and otherwise, the several surrogate courts shall have the like powers, jurisdiction and authority for the examination of witnesses, the production of deeds and writings, and generally for the enforcing of all orders, decrees and judgments made or given by such surrogate courts in respect to the appointment, control and removal of guardians as aforesaid, as are given to them by the Surrogate Courts Act in matters testamentary, and such orders, decrees and judgments may be appealed from to the Court of Chancery in the manner provided for appeals to such court in matters testamentary. 22 Vic., ch. 93, sec. 62.

When judges of
probate and sur-
rogate courts
may appoint
guardians.

3. Upon the written application of any such infant, or the friend or friends of such infant, residing within the jurisdiction of the surrogate court to which application may be made, and after proof of twenty days' public notice of the application and of notice thereof to the mother of such infant, or that such infant has no mother living in Upper Canada, the judge of such court may appoint some suitable and discreet person or persons to

to be guardian or guardians of such infant. 8 Geo. IV.,
ch. 6, s. 1.

4. The judge shall take from the guardian or guar- ^{Such guardians}
dians so appointed a bond in the name of the infant, in ^{to give security}
such penal sum and with such securities as the judge di- ^{by bond.}
rects and approves, having regard to the circumstances ^{Condition of}
of the case, and such bond shall be conditioned that the ^{bond.}
said guardian or guardians will faithfully perform the
said trust, and that he or they, the said guardian or
guardians, or his or their respective executors or admin-
istrators, will, when the said ward becomes of the full
age of twenty-one years, or whenever the said guardian-
ship shall be determined, or sooner if thereto required
by the said surrogate court, render to his or their said
ward, or to his or her executors or administrators, a true
and just account of all goods, moneys, interest, rents,
profits or property of such ward, which come into the
hands of such guardian or guardians, and will thereupon
without delay deliver and pay over to the said ward, or
to his or her executors or administrators, the property,
or the sum or balance of money which may be in the
hands of the said guardian or guardians belonging to
such ward, deducting therefrom and retaining a reason-
able sum for the expenses and charges of the said
guardian or guardians, and such bond shall be recorded ^{Bond to be re-}
by the registrar of the court in the books of his office. ^{corded.}
8 Geo. IV., ch. 6, sec. 1.

AUTHORITY OF GUARDIANS.

5. The guardian or guardians of any infants so ap- ^{Guardians'}
pointed, shall, during the continuance of his or their ^{authority.}
guardianship, have authority to act for and in behalf of
the said ward :

1. And may appear in any court and prosecute or de- ^{To appear in ac-}
fend any action in his or her name ; ^{tions at law.}
2. And shall have the charge and management of his

To manage real
and personal
estate, &c.

or her estate, real and personal, and the care of his or her person and education;

Bind ward an
apprentice.

3. And in case the infant be under the age of fourteen years, may, with the approbation of two of her Majesty's justices of the peace, and the consent of such ward, or in case the infant be not under the age of fourteen years, then with the consent of the ward only, place and bind him or her an apprentice to any lawful trade, profession or employment; such apprenticeship, in case of males, not extending beyond the age of twenty-one years, and in case of females, not beyond the age of eighteen years, or the marriage of the ward within that age. 8 Geo. IV., ch. 6, sec. 2; see 14, 15 Vic., ch. 11, sec. 1.

Limitation of ap
prenticeship.

REMOVAL OF GUARDIANS.

How guardians
may be removed.

6. The judge by whom any guardian or guardians have been appointed may, upon reasonable complaint made and sustained, or cause shewn to his satisfaction, remove such guardian or guardians from his or their said guardianship, and if it be judged necessary, may appoint another guardian or guardians of the said infant. 8 Geo. IV., ch. 6, sec. 3.

Procedure under
this act in testa
mentary matters,
&c.

7. The practice and procedure under this act, shall, except where otherwise provided for by rules or orders under the Surrogate Courts Act, conform, as the circumstances of the case will admit, to the practice and procedure prescribed by the said Surrogate Courts Act, and all the powers given by the several sections of that act, to the judges appointed or to be appointed as contained in the eighteenth and nineteenth sections, may from time to time be exercised by them, for the purpose of simplifying and expediting the proceedings, and for fixing and regulating the fees to be taken by officers and by attorneys and counsel respectively for business and proceedings done and taken under this act in the several surrogate courts. 22 Vic., ch. 93, sec. 64.

CUSTODY OF INFANTS. (q)

8. Any of the superior courts of law or equity in Upper Canada, or any judge of any of such courts, upon hearing the petition of the mother of any infant, (r) being in the sole custody or control of the father thereof, (s) or of any person by his authority, or of any guardian after the death of the father, may, if such court or judge sees fit, make order for the access of the petitioner to such infant, at such times and subject to such regulations as such court or judge thinks convenient and just, and if such infant be within the age of twelve years, may make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such court or judge may direct, and such court or judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sum or sums of money from time to time, as, according to the pecuniary circumstances of such father or the value of such estate, such court or judge thinks just and reasonable. 18 Vic., ch. 126, sec. 1.

Court or judge may make order for allowing the mother access to any infant in the sole custody of the father or other person, or for its delivery if under twelve years, and also order for its maintenance.

9. The court or judge as aforesaid may enforce the attendance of any person before such court or judge, to testify on oath respecting the matter of such petition by order or rule made for that purpose, and on the service

Court or judge in any such case

(q) As to the general objects of this enactment see *Wellesley v. The Duke of Beaufort*, 2 Russ. 1, and *Warde v. Warde*, 2 Ph. 787.

(r) A married woman may petition under this statute without a next friend. (*Re Groom*, 7 Hare, 88.) It seems also that the order may be made *ex parte*, if the exigencies of the case require it. (*Re Taylor*, 11 Sim. 178.)

(s) The act does not apply where the children are not in the custody of the father. (*Re Fynn*, 2 DeG. and Sm. 457, 475.)

See, however, *Re Tomlinson*, 3 DeG. & Sm. 371, 372; *Re Taylor*, 11 Sim. 178; *Corsellis v. Corsellis*, 1 Drew. & War. 285, in which cases the rule laid down in *Re Fynn* has been somewhat relaxed.

may compel the attendance of witnesses.

of a copy thereof and the payment of expenses as a witness, in the same manner as in a suit or action in the said courts respectively, or may receive affidavits respecting the matters in such petition. 18 Vic., ch. 126, sec. 2.

Orders enforceable by process of contempt.

10. All orders made by the court or a judge by virtue of this act, shall be enforceable by process of contempt by the court or judge by which or by whom such order has been made. 18 Vic., ch. 126, sec. 3.

Order not to be made in favour of mother guilty of adultery.

11. No order directing that the mother shall have the custody of or access to an infant shall be made by virtue of this act, in favour of a mother against whom adultery has been established by judgment in an action for criminal conversation, at the suit of her husband against any person. 18 Vic., ch. 126, sec. 4. (t)

AN ACT RESPECTING THE ASSURANCE OF ESTATES TAIL.
CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAPTER LXXXIII.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

The Court of Chancery to be the protector of lunatic, &c.

23. If any person, protector of a settlement, be lunatic, idiot, or of unsound mind, and whether he has been found such by inquisition or not, then the Court of Chancery shall be the protector of such settlement, in lieu of the person who is such lunatic or idiot, or of unsound mind, as aforesaid; or if any person, protector of a settlement, be convicted of treason or felony; or,

(t) As to removing children from the custody of the father generally, see *Foreyth on Infants*, ch. 1 and VIII.; *Macpherson on Infants*, 142-150; *McQueen on Divorce*, ch. XVIII.; and see the following cases bearing generally upon this section; *Wellesley v. Duke of Beaufort*, 2 Rus. 1; *Thomas v. Roberts*, 3 DeG. & Sm. 758; *Ball v. Ball*, 2 Sim. 35; *Shelley v. Westbrook*, Jac. 266; *Anon.* 2 Sim. N. S. 54; *Re Curtis*, 7 W. R. 474; 5 Jur. N. S. 1147; 28 L. J. Ch. 458; *DeManneville v. De Manneville*, 10 Ves. 52; *Creuze v. Hunter*, 2 Cox 242; 2 Brown, C. C. 500; *Lyons v. Blenkin*, Jac. 250; *Re Spence*, 2 Phil. 247; *Courtois v. Vincent*, Jac. 268; *Vansittart v. Vansittart*, 2 DeG. & J. 249; *Walrond v. Walrond*, John. 18; *Hope v. Hope*, 4 DeG. M. & G. 328; *Crouch v. Waller*, 4 DeG. & J. 312.

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STATES TAIL.

CHAPTER LXXXIII.
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if any person, not being the owner of a prior estate under a settlement, be protector of such settlement, and be an infant; or if it be uncertain whether such last mentioned person be living or dead; then the Court of Chancery shall be the protector of such settlement, in lieu of the person convicted as aforesaid, or of the person who is an infant, or whose existence cannot be ascertained as aforesaid; or if any settlor entailing lands declares, in the settlement by which the lands are entailed, that the person who, as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate is subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case there be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate be sufficient to qualify the owner thereof to be protector of the settlement, and there happens at any time to be no protector of the settlement as to the lands in which the prior estate is subsisting, the said Court of Chancery shall, while there is no such protector, and the prior estate is subsisting, be the protector of the settlement as to such lands.
9 Vic., ch. 11, sec. 21; 9 Vic., ch. 10, sec. 1.

37. In cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent

Courts of equity
excluded from
giving any effect
to dispositions in
tail, &c.

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Queen on Divorce,
s section; Wel-
Sm. 758; Ball
N. S. 54; *Re*
anneville v. De
C. 500; Lyons
Jac. 268; Van-
a. 18; Hope v.

given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement, which, in a court of law, would not be an effectual disposition or consent under this act; and no disposition of lands under this act by a tenant in tail thereof, in equity, and no consent by a protector of a settlement to a disposition of lands under this act, by a tenant in tail thereof, in equity, shall be of any force, unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law. 9 Vic., ch. 11, sec. 35.

When the Court of Chancery may consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary.

38. In every case in which the Court of Chancery is the protector of a settlement, such court, while protector of such settlement, shall, on the motion or petition in a summary way, by a tenant in tail under such settlement, have full power to consent to a disposition, under this act, by such tenant in tail; and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid, shall be such as may be approved of by the said court, and the said court may make such orders in the matter as may be thought necessary; and if such court, in lieu of any such person as aforesaid, be the protector of a settlement, and there be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person, being protector as aforesaid, consents thereto in the manner in which the consent of the protector is by this act required to be given. 9 Vic., ch. 11, sec. 36.

Order of the Court of Chancery to be evidence of consent.

39. In every case in which the said Court of Chancery is the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the

disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition has been made. 9 Vic., ch. 11, sec. 37.

AN ACT RESPECTING THE PARTITION AND SALE OF REAL ESTATE.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CHAPTER LXXXVI.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

5. When such lands are situated in two or more counties the proceedings shall be carried on in the Court of Queen's Bench, or Common Pleas, or in the Court of Chancery; and when the lands are situated in one county only, the proceedings may be carried on in the county court of such county, or in any of the superior courts of law or equity. 2 Wm. IV., c. 35, s. 1.

When lands situate in two or more counties.

When in one county.

37. The proceedings upon petition, if commenced in a county court, may, at any time before judgment, be removed into either of the superior courts of law or equity by *certiorari*, to be allowed by any judge of such court, on security being given by the party applying for the *certiorari* for the costs of the proceedings on petition, to the satisfaction of such judge; and upon any final judgment, decree or order, an appeal may be had by any of the parties interested in the same manner and with the same consequences as in other cases of appeal, from the decision of any court rendering such judgment, decree or order. 20 Vic., ch. 65, sec. 31.

Removal of proceedings by *certiorari*.

38. Where the interests in such estate are equitable fees simple, the Court of Chancery alone shall have the same powers, upon petition or bill filed in that court, to act thereupon, as are hereby given to the courts of law and equity in other cases, and the same notices shall be given, served, published and verified, guardians of minors appointed, and the same rules apply as to par-

Powers of the Court of Chancery when the interests are equitable fees simple.

[22 VIC., CH. LXXXVI., SECS. 40, 41, AND CH. LXXXVIII., SEC. 27.]

ties and the like proceedings be had, as hereinbefore directed. 20 Vic., ch. 65, sec. 32.

The Court of Chancery to possess like powers as the Court of Chancery in England.

40. In all cases of partition and sale of estates of joint tenants, tenants in common and coparceners, the Court of Chancery shall also possess the same jurisdiction as by the laws of England, on the tenth of August, one thousand eight hundred and fifty, were possessed by the Court of Chancery in England. 13 & 14 Vic., ch. 50, sec. 4.

Partition or sale by the Court of Chancery to be as valid as if by the parties.

41. Any partition or sale made by the Court of Chancery shall be as effectual for the apportioning or conveying away of the estate or interest of any married woman, infant or lunatic, party to the proceedings by which the sale or partition has been made or declared, as of any person competent to act for himself, and an office copy of any decree, order or report, for a partition or sale shall be sufficient evidence in all courts of the partition declared thereby, and of the several holdings by the parties of the shares allotted to them. 13 & 14 Vic., ch. 50, sec. 4.

AN ACT RESPECTING THE LIMITATION OF ACTIONS AND SUITS RELATING TO REAL PROPERTY, AND THE TIME OF PRESCRIPTION IN CERTAIN CASES.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CH. LXXXVIII.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

The case of mortgages prior to the establishment of the Court of Chancery provided for.

27. Whereas the law of England was at an early period introduced into Upper Canada, and continued to be the rule of decision in all matters of controversy relative to property and civil rights, while at the same time, from the want of an equitable jurisdiction, until the fourth day of March, one thousand eight hundred and thirty-seven, it was not in the power of mortgagees to foreclose, and mortgagors out of possession were

unable to avail themselves of their equity of redemption, and in consequence of the want of these remedies the rights of the respective parties, or of their heirs, executors, administrators or assigns, may be attended with peculiar equitable considerations, as well in regard to compensation for improvements, as in respect to the right to redeem, depending on the circumstances of each case, and a strict application of the rules established in England might be attended with injustice; the court shall have authority in every case of mortgage, where, before the said fourth day of March, one thousand eight hundred and thirty-seven, the estate had become absolute in law, by failure in performing the condition, to make such decree in respect to foreclosure or redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators or assigns, as may appear to the court just and reasonable under all the circumstances of the case, subject, however, to appeal by either party. 7 Wm. IV., ch. 2, sec. 11.

LIMITATION OF SUITS IN EQUITY.

31. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same, respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity. 4 Wm. IV., ch. 1, sec. 32.

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

32. When any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to

In cases of express trust, the right shall not be deemed to

have accrued until a conveyance to a purchaser.

have first accrued, according to the meaning of this act, at, and not before, the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. 4 Wm. IV., c. 1. s. 33.

In cases of fraud no time shall run whilst the fraud remains concealed.

33. In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered. 4 Wm. IV., c. 1, s. 34.

Unless in the case of *bona fide* purchaser for value without notice.

34. Nothing in the last preceding clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know and had no reason to believe that any such fraud had been committed. 4 Wm. IV., c. 1, s. 34.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

35. Nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act. 4 Wm. IV., c. 1, s. 35.

AN ACT RESPECTING THE REGISTRATION OF DEEDS, WILLS, JUDGMENTS, DECREES IN CHANCERY AND OTHER INSTRUMENTS.

CONSOLIDATED STATUTES OF UPPER CANADA, 22 VIC., CH. LXXXIX.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

40. Every decree of foreclosure, and every other decree in the Court of Chancery, or in any county court affecting any title or interest in land, may, at the instance of any person, be registered in the registry office of the county where the land is situate, on a certificate given by the registrar or clerk of the court, stating the substance and effect of such decree, and the lands affected thereby. 18 Vic., c. 127, s. 4.

How decrees of foreclosure, &c., shall be registered.

43. The filing of any bill, or the taking of any proceeding in the Court of Chancery in Upper Canada, or county court on its equity side, in which bill or proceeding any title or interest in lands is brought in question, shall not be deemed notice of such bill or proceeding to any person not being a party to such bill or proceeding, unless and until a certificate given by the registrar, deputy-registrar or clerk of the court to some person demanding the same, in the form mentioned in this section, has been registered in the registry office of the county in which are situate the lands of which the title or interest is questioned in such bill or proceeding:

What only shall be deemed notice of proceedings in Chancery by which title or interest in lands shall be called in question.

FORM.

"I certify that in a suit or proceeding in Chancery, or in the county court of —, on its equity side (*as the case may be*), between A. B. and C. D., some title or interest is called in question in the following lands, (*stating them*)."

But no such certificate shall be required to be registered in any suit or proceeding for foreclosure of a registered mortgage. 18 Vic., c. 127, s. 3.

As to suit for foreclosure.

AN ACT RESPECTING AFFIDAVITS, DECLARATIONS, AND AFFIRMATIONS, MADE OUT OF THIS PROVINCE FOR USE THEREIN.

26 VICTORIA, CH. —.

Her Majesty, by and with the advice and consent of

the Legislative Council and Assembly of Canada, enacts as follows:

Governor in council may appoint commissioners for taking affidavits in the United Kingdom, to be used in Canada.

Their powers.

Style of commissioners.

Affidavits to be used in Canada may be made before certain functionaries in foreign parts.

1. The Governor in council may, by one or more commission or commissions under his hand and seal, from time to time empower such and as many persons as he may think fit and necessary, to administer oaths and take and receive affidavits, declarations and affirmations in the United Kingdom of Great Britain and Ireland, or any colony or dependency thereof, in or concerning any cause, matter, or thing depending or in anywise concerning any of the proceedings to be had in the Courts of Queen's Bench and Common Pleas, the Superior Court, and the Court of Chancery, or any other court of law or equity of record in this province, whether now existing or hereafter to be constituted; and every oath, affidavit, declaration, or affirmation taken or made as aforesaid shall be as valid and effectual, and shall be of the like force and effect to all intents and purposes, as if such oath, affidavit, declaration or affirmation had been administered, taken, sworn, made or affirmed before a commissioner for taking affidavits therein, or other competent authority of the like nature.

2. The Commissioners so to be appointed shall be styled "Commissioners for taking affidavits in and for the Canadian courts."

3. Oaths, affidavits, affirmations, or declarations administered, sworn, affirmed or made out of Canada, before any commissioner authorised by the Lord Chancellor to administer oaths in Chancery in England, or before any notary public, certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough, or town corporate in Great Britain or Ireland, or in any colony of Her Majesty, or in any foreign country, and certified under the common seal of such city, borough, or town corporate, or before a judge of any court of supreme jurisdiction in any colony belong-

ing to the Crown of Great Britain, or any dependency thereof, or before any consul, vice-consul, acting-consul, pro-consul, or consular-agent of her Majesty exercising his functions in any foreign place, for the purposes of and in or concerning any cause, matter or thing depending, or in any wise concerning any of the proceedings to be had in the said courts, shall be as good, valid and effectual, and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation, or declaration had been administered, sworn, affirmed, or made in this province before a commissioner for taking affidavits therein, or other competent authority of the like nature.

4. Any document purporting to have affixed, impressed, or subscribed thereon or thereto the signature of any such commissioner, or the signature and official seal of any such notary public, or the seal of the corporation and the signature of any such mayor or chief magistrate as aforesaid, or the seal and signature of any such judge, consul, vice-consul, acting-consul, pro-consul, or consular agent, in testimony of any such oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made, by or before him, shall be admitted in evidence without proof of any such signature, or seal and signature, being the signature or the seal and signature of the person whose signature or seal and signature the same purport to be, or of the official character of such person.

Seal used not
to be proved.

5. Any affidavit, declaration or affirmation proving the execution of any deed, power of attorney, will, or probate, or memorial thereof, for the purpose of registration in this province, may be made before a commissioner appointed under this act, or other person authorised hereby to administer or take oaths, affidavits, declarations and affirmations.

They may be
used for registra-
tion.

6. No informality in the heading or other formal requisites to any affidavit, declaration or affirmation made

Informal headings, &c., not to invalidate.

or taken before any commissioner or other person under this act, shall be any objection to its reception in evidence, if the court or judge before whom it is tendered think proper to receive it

Tendering document with false seal, &c., to be felony.

7. If any person shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall be subject to the punishment by law provided for felony.

AN ACT RESPECTING THE ATTENDANCE OF WITNESSES IN THE COURTS OF UPPER AND LOWER CANADA, RECIPROCALLY.

CONSOLIDATED STATUTES OF CANADA, 22 VIC., CH. LXXIX.

Courts may issue subpoenas to any part of Canada.

4. If, in any action or suit depending in any of her Majesty's superior courts of law or equity in Canada, it appears to the court, or when not sitting it appears to any judge of the court that it is proper, to compel the personal attendance at any trial or *enquête* or examination of witnesses, of any person who may not be within the jurisdiction of the court in which the action or suit is pending, the court or judge, in their or his discretion, may order that a writ called a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, shall issue in special form, commanding such person to attend as a witness at such trial or *enquête*, or examination of witnesses, wherever he may be in Canada. 18 Vic., ch. 9, sec. 1.

When not to be issued.

6. No such writ shall be issued in any case in which an action is pending for the same cause of action in that section of the province, whether Upper or Lower Canada respectively, within which such witness or witnesses may reside. 18 Vic., ch. 9, sec. 1.

Writs to be specially noted.

7. Every such writ shall have at the foot, or in the margin thereof, a statement or notice that the same is issued by the special order of the court or judge making such order, and no such writ shall issue without such special order. 18 Vic., ch. 9, sec. 2.

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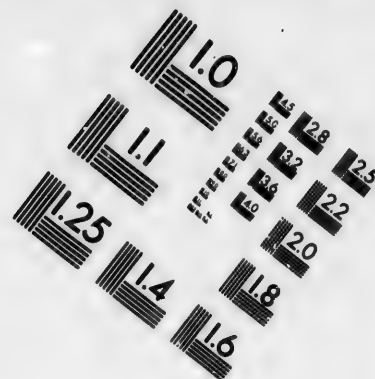
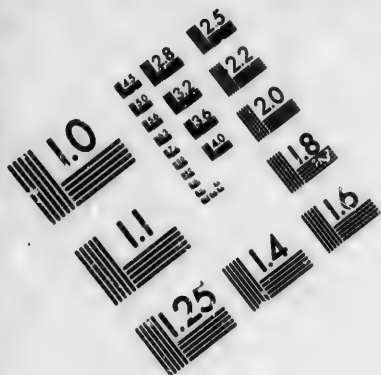
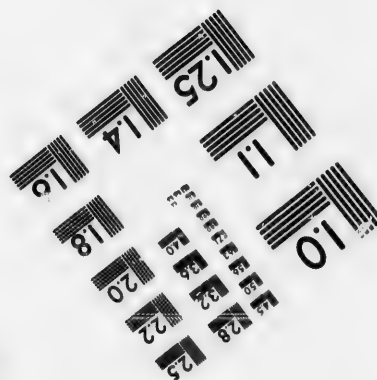
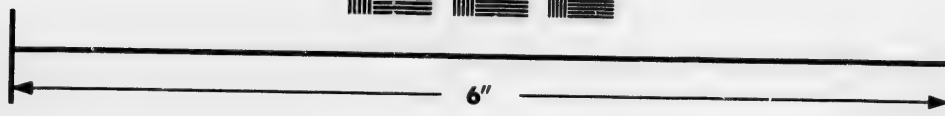
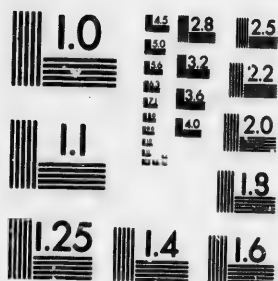


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ERRATA AND ADDENDA.

Page 13, line 8 from the bottom.] Strike out the words "Dalton v. McNider, 1 U. C. L. J. 57."

Page 20, lines 12 and 13 from the bottom.] Strike out these lines and insert: "Formerly the judgment creditors of the mortgage were necessary parties to a foreclosure suit (Sanderson v. Ince, 7 Grant, 383;) they could be made however in the master's office (*Ibid.*) Since the passing of the act abolishing the registry of judgments they are unnecessary parties and it would also seem that as the interest of a mortgagee is not saleable under *fi. fa.* lands, his creditors under *fi. fa.* lands are improper parties either originally or in the master's office."

Page 27, line 9 from bottom.] Strike out the word "as" and insert the word "and" instead.

Page 28, line 6 from the top.] Strike out the first figure 3.

Page 29, line 3 from the top.] Insert the word "redemption" before the word "foreclosure."

Page 81, line 4 from the bottom.] After the words "4 Russ. 210" add: "This was under the old practice, now, however, it is improper to state any facts in the petition whether appearing in the pleadings or not. The form of petition now used will be found at p. 390 *infra*."

Page 103, line 25 from the top.] After this line add the words: "See further as to production after decree, p. 367, *infra*."

Page 145, line 17 from the bottom.] The words "proceedings to ale" should be "proceeding to sale."

Page 219, line 9 from the top.] Strike out the word "renew" and insert the word "review" in its place.

Page 240, line 17 from the bottom.] Strike out the figures "XIII." and substitute "XV."

Page 241, lines 2 in the heading of the page and 4 from the top.] Strike out "17th" and substitute "19th" in both places.

Page 263, line 2 in the heading of the page.] Strike out the figures "1853" and substitute "1861."

Page 319, line 9 from the top.] After the words "7 Grant, 606" add: "see, however, the remarks on the head note of this case at p. 498, *infra*."

Page 440, between lines 7 and 8 from the bottom.] Insert "Præcipe to set down" on further directions, 1s. 8d. Paid, 2s. 6d."

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made however in the
the registry of judg-
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ures " 1858 " and

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